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Toolco's Notice of Motion, August 8, 1961

[Doc. 22]

[CAPTION]

61, Civ. 2324

MOTION TO DISMISS THE COMPLAINT

SIRS:

PLEASE TAKE NOTICE that, upon the summons and complaint herein, the annexed affidavits of Raymond M. Holliday and Chester C. Davis, and all the proceedings had herein, the undersigned will move this Court at a stated term thereof for the hearing of motions to be held at the United States Court House, Foley Square, New York, New York, Room 506, on the 29th day of August, 1961 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order pursuant to Rules 12(b) and 56(b) of the Federal Rules of Civil Procedure dismissing the complaint herein and each of the claims for relief alleged in said complaint, and for judgment in favor of the defendant Hughes Tool Company, on the grounds that said complaint and each of the claims for relief alleged in said complaint fails to state a claim upon which relief can be granted, that this Court lacks jurisdiction over the subject matter of the action and over the subject matter of each of said alleged claims for relief, that there is no genuine issue as to any material fact and

A-2076

Toolco's Notice of Motion

that defendant Hughes Tool Company is entitled to judgment as a matter of law.

Dated: New York, N. Y.

August 8, 1961.

Yours, etc.,

CHESTER C. DAVIS,
Attorney for Defendant
Hughes Tool Company
120 Broadway,
New York 5, N. Y.

To:

CAHILL, GORDON, REINDEL & OHL,
Attorneys for Plaintiff
Trans World Airlines, Inc.,
80 Pine Street,
New York 5, N. Y.

District Court Order, August 14, 1961

[408]

[CAPTION]

61 Civil 2324

MEMORANDUM

The motion of defendant Hughes Tool Company is hereby granted as follows: the taking of depositions pursuant to the plaintiff's notices served on August 1, 1961 shall be, and hereby are, stayed until defendant Hughes Tool Company shall have completed the taking of depositions pursuant to the notices which said defendant served on August 3, 1961.

By force of the understanding of counsel and Judge Dimock's order of July 7, 1961, the August 3, 1961 notices of said defendant are deemed to have been made between July 7, 1961 and July 20, 1961. On the other hand, by force of said understanding and order, plaintiff's August 1, 1961 notices are deemed to have been made after July 20, 1961, because said notices of plaintiff without leave of court would be permitted under F.R.C.P. Rule 26(a) only after [409] July 20, 1961.

Consequently, said defendant has priority in the taking of depositions under the general rule that, in the absence of some special and good reason, pre-trial examinations should proceed in the order in which they are demanded.

The dispositive issue is whether the record before the Court evidences special circumstances warranting a departure by this Court, in its discretion, from the general rule.

The Court has concluded that the plaintiff has not made such a showing. The Court will adhere to the general rule. So ordered.

As this memorandum-decision constitutes an order, no settlement is necessary.

/s/ WILLIAM B. HERLANDS

Transcript of Pretrial Hearing, September 6, 1961

[Doc. 47]

[CAPTION]

61 Civ. 2324

Before: Hon. CHARLES M. METZNER, District Judge.

New York, September 6, 1961, 11:00 a.m.

[APPEARANCES]

. . .

[2] The Court: What is this all about? I got the matter referred to me for all purposes, so who wants to start?

Mr. Sonnett: My name is Sonnett, your Honor, counsel for plaintiff. I take it that Mr. Davis is principal counsel for Hughes Tool.

I take it that our problem today is to ask your Honor to lay out a schedule for us covering pending motions and deposition schedules.

The Court: What motions are pending?

Mr. Sonnett: There is a motion by the plaintiff for production of documents, and there is a motion by defendant to dismiss and for summary judgment, both motions were directed by Judge Ryan to be stayed pending the assignment of the case to your Honor and pending this meeting with your Honor.

The Court: I assume that I would have to pass on the motion to dismiss and for summary judgment before anything else, unless you see some different procedure I should follow.

Mr. Sonnett: Whatever procedure is agreeable to your Honor.

The Court: You are more familiar with the case than I am at this stage of the proceeding, so I [3] will be guiding actually at this point.

Transcript of Pretrial Hearing, September 6, 1961

Mr. Davis: Your Honor, I have prepared a memorandum which outlines the proceedings had to date so far and which may be helpful to your Honor in following the position of the defendant Tool Company. If I may hand this to your Honor, I think it may be helpful.

Actually, there is one other thing which is pending, and from the defendant Tool Company's point of view it is important, as we see it, that we schedule as promptly as possible the commencement of the taking of depositions in accordance with the decision made by Judge Herlands in this matter, in which he has established the priority of the defendant to commence the taking of depositions.

In connection with the motion to dismiss, which was filed by the defendant on August 9th, the most important matter now pending is awaiting the opposition papers to be filed by the plaintiff, because as soon as we get those opposing affidavits, which presumably will disclose or delineate the factual contentions underlying the broad allegations of this complaint, the sooner we will be in a position to intelligently discuss the scope of the issues which will [4] have to be tried in so far as that complaint is concerned; but to start at the beginning, perhaps I should first describe what this case is all about.

This is an action that was commenced by TWA, or, I should say perhaps, [those] now in control of TWA, on June 30th of this year. It is a complaint which alleges violation of the antitrust laws and seeks damages in excess of \$100 million and other injunctive relief, temporary injunction, and so forth.

Since both TWA and the defendant Hughes Tool Company—we will refer to Hughes Tool Company as Toolco—are both Delaware corporations, the jurisdiction of this court rests solely upon the allegations of the violation of the antitrust laws.

Transcript of Pretrial Hearing, September 6, 1961

To identify the parties somewhat, TWA, as your Honor undoubtedly knows, is one of the leading air lines of this country. Toolco is primarily engaged in the manufacture and sale of equipment in the oil well drilling industry. Toolco has not at any time been engaged in the manufacture of commercial flight equipment and, as it appears from the affidavit of Mr. Holliday, which was filed in support of the motion to dismiss, the only activities of the Tool Company with respect to the sale or lease of aircraft to commercial [5] air lines with a minor exception have arisen from the efforts made in the past by the Tool Company to assist TWA in its acquisition of aircraft equipment and the financing of such acquisitions.

Now, the Toolco is the owner of more than 78 per cent of TWA, of the capital stock of TWA. This stock, however, is presently held in a voting trust. It is a voting trust which was insisted upon by certain lending institutions in connection with what is referred to as the December, 1960, financing; it is an agreement, I believe, dated December 1, 1960, which became effective December 31, 1960, so that the Tool Company since December 31, 1960, while it continues to be the owner of 78 per cent of the outstanding stock of TWA, has not had any voting control over TWA.

To understand a little bit some of the issues I will advert to in a moment, I should pause at this point to explain this control situation of TWA which exists at the present time.

Under the voting trust, which the lending institutions required in connection with this December, 1960, financing, a majority of the notes issued by TWA at that time, in the aggregate of some \$145 million—

[6] Mr. Cook: \$165 million.

Mr. Davis: —the holder of the majority of those notes has the power, under the terms of the voting trust, to the

Transcript of Pretrial Hearing, September 6, 1961

Irving Trust as the notes agent, to remove—first of all, to appoint or remove, or appoint as successors to, a majority of the voting trustees. At the present time the Equitable and the Metropolitan Insurance Companies, as the holders of the majority of those notes under the terms of the voting trust, through the Irving Trust Company as notes agent, have the absolute power to remove the majority of the voting trustees without cause—this is specifically so provided for—and to select and appoint successors.

The voting trustees are Mr. Breech, Mr. Olds, who were appointed by the lending institutions, and Mr. Holliday, who is an officer of the Tool Company and a representative of the Tool Company and a voting trustee.

The bylaws of TWA provide that the holders of the majority of the stock may remove any of the directors of TWA without cause and elect their successors; and, of course, 78 per cent of the stock, when put into this voting trust, the effect that we have [7] of these lending institutions through these voting trustees since December 31, 1960, have been, as a matter of legal power—though the extent it has been exercised may be in dispute, I don't know—in absolute power and control of TWA.

Mr. Hughes, who was named as a defendant but who has not been served, is the sole owner of the Tool Company, of the Hughes Tool Company, referred to as Toolco.

Mr. Holliday is an officer and director of the Toolco.

Neither Mr. Hughes nor Mr. Holliday have been served with process, although they are named as defendants.

The Tool Company acquired its controlling interest in ownership in TWA beginning some time prior to 1942. At the end of 1942, I believe it is, the Tool Company had acquired approximately 45 per cent of the outstanding stock

Transcript of Pretrial Hearing, September 6, 1961

of TWA. This acquisition of the controlling interest, practical controlling interest, in TWA was subject to and approved by an order of the Civil Aeronautics Board, the CAB, under Section 408 of what is now known as the Federal Aviation Act of 1958, with a comparable section in [8] the Civil Aeronautics Act of 1938 when it was originally passed. That order which found it was consistent with the public interest is to be found—referring to my memorandum—in 6 CAB 153. That was a decision by the CAB in 1944.

I should say at this point that one of the conditions imposed by that order was that no transaction, no commercial transaction, between the Tool Company and TWA could take place which exceeded \$200 per item or which in the aggregate exceeded \$10,000 without further CAB approval. Then in 1950 the CAB was confronted with the question as to whether or not a further acquisition of stock by the Tool Company, raising its interests in TWA from the 45 per cent to approximately 78 per cent, a little in excess of 78 per cent, required further approval by the CAB. For the acquisition of control by the Tool Company of TWA and the issue then before the Board, as recognized by the decision, was that while under the 1944 decision the Tool Company, as a practical matter, had control of TWA, having 45 per cent of the outstanding stock, the situation developed that the Tool Company, with 78 per cent of the stock, could control and exercise control over TWA without soliciting proxies of minority [9] stockholders, in effect without the aid or assistance of any other owners of TWA, and the Board held that that change in situation required a further determination by the CAB under 408 of the Act, and in 9 CAB 381 and 12 CAB 192 we find the Board again approving this acquisition of further

Transcript of Pretrial Hearing, September 6, 1961

control by the Tool Company over TWA, subject to the same limitation, that every transaction between the Tool Company and TWA involving \$200 per transaction or aggregating over \$10,000 was subject to CAB approval.

As your Honor knows, there is an exemption from the application of the antitrust laws which is to be found in the Federal Aviation Act itself, Section 414—I refer to it in this memorandum—and in Section 7 itself of the Clayton Act, when the acquisition of control of an air line is the result of a CAB order approving the transaction after consideration by the CAB of the public interest involved, and in Section 414 of the Federal Aviation Act you find a clear-cut statutory exemption from the application of the antitrust laws required by or necessitated by any order of the CAB.

The complaint, which I am about to describe, does not advert in any way, shape or form to [10] the CAB approvals, and there is no allegation which negates the existence of that exemption; we are left in the dark. I think it is fair to assume that counsel for TWA is going to assert a contention of some kind that some transaction or activities took place which are not covered by these CAB orders, because I think it is perfectly clear, so far as the Tool Company is concerned, every transaction relating to any of the matters referred to in the complaint, that is, with respect to flight equipment or the financing of flight equipment, was submitted to the CAB and approved by the CAB and, interestingly enough, those applications were prepared by and submitted to the CAB by TWA—by TWA.

Let me digress for a moment and point out that although we are still the 78 per cent owner, when we recently made a formal request, in regard to this motion to dismiss, to TWA's counsel to furnish us with the files of

Transcript of Pretrial Hearing, September 6, 1961

TWA relating to these applications for approvals and approvals to be obtained from the CAB, that request was denied on the ground at the time that Judge Herlands had not yet come down with a decision as to our priority in discovery proceeding. Since that time, of course, Judge Herlands has come [11] down with his decision establishing our priority in the commencement of the taking of depositions.

This complaint, as I indicated before, was filed on June 30, 1961. At the time that it was filed, the plaintiff obtained an order sealing the complaint. The Tool Company did not know and the record did not disclose the reasons or the grounds for sealing the complaint, but that is what took place. At the same time the plaintiff obtained an order to show cause, originally returnable July 11th, for the purpose of the taking of the deposition of Mr. Hughes, or, rather, I should say the way it read was that it was an order to show cause to take the deposition of the Tool Company, by its officer and director, Howard R. Hughes, seven days after the service of the notice. The affidavit in support of that application for granting the plaintiff an opportunity to take a deposition out of turn, so to speak, was that they believed that they needed to get some facts which would enable them to make up their mind as to whether or not they had the basis to seek some kind of a temporary restraining order.

The parties then consented to an order which was entered by this court on July 7th, and the effect of that order was to continue the seal of the [12] complaint and all the papers filed until August 1 and to adjourn or postpone this application for the taking of the deposition of the Tool Company, through Mr. Hughes, until that same date.

There were other portions of that order which became the subject of a decision by Judge Herlands, and I will refer to them when I come to that decision.

Transcript of Pretrial Hearing, September 6, 1961

I think it is fair to say that it is a well-known, general fact that Mr. Hughes personally is or has been in the past reluctant to make public appearances and has preferred to have the business of the Tool Company operated by other officers of the Tool Company who consummate whatever transactions appear to be in the best interest of the Tool Company.

The complaint itself contains three claims for relief.

The first claim for relief, which covers a period from 1939 to date, alleges violations by the defendants of Sections 1 and 2 of the Sherman Act and Sections 3 and 7 of the Clayton Act. These alleged violations of the antitrust laws seem to be or can be classified into four categories.

It is claimed that the defendant Tool [13] Company at various times in and after 1939 acquired the common stock of TWA in an amount which presently aggregates more than 78 per cent; that the defendant Tool Company foreclosed a potential supplier from furnishing jet powered aircraft to TWA and sought to establish TWA as a captive market for aircraft which were purchased by Toolco and furnished by the Tool Company to TWA; that the defendants dictated the financing arrangements with respect to the acquisition of aircraft by TWA, and that the defendants and Atlas Corporation proposed a merger of Northeast Airlines with TWA upon terms allegedly advantageous to defendant and disadvantageous to TWA. Atlas is named as a co-conspirator in this complaint but is not named as a defendant. Atlas Corporation owned a controlling interest in Northeast Airlines.

The second claim for relief in the complaint relates to the same violation of the antitrust laws and to the same acts which are alleged, to the extent to which they are alleged in the first claim for relief, except it speaks only for the period from December, 1960, to date. That is the

Transcript of Pretrial Hearing, September 6, 1961

period from which TWA passed into the control of certain other persons.

[14] Quite frankly, at this point it is a little difficult for the Tool Company to understand what it is that the second claim for relief has added as a cause of action to what is contained in the first claim for relief.

The third claim for relief appears to be predicated upon the same alleged acts as the second, but it characterized such acts as being a malicious and wilful interference with the business of TWA, and presumably seeks relief upon general principles of law and equity in respect of the application of the antitrust laws. I assume that the theory there is that, if the jurisdiction of this court has been established by the allegation of the first and second claims for relief, pendant jurisdiction would apply to the third claim for relief.

In view of the fact that it cannot be disputed that the acquisition and control of TWA by the Tool Company was approved by the CAB, and such approval exempts such acquisition from the application of the antitrust laws, and once it is realized that the Tool Company, with the approval of the CAB, became the owner of 78 per cent or better of TWA, it becomes a little difficult to understand how the Tool Company [15] conspired with TWA or did anything with respect to TWA other than exercise the control which normally follows a 78 per cent ownership. When you add to that the fact that every transaction between the Tool Company and TWA was specifically approved by the CAB, it is easier to understand why the Tool Company feels that it is necessary to commence some convenient but early date for the taking of the deposition of TWA and others to develop the facts which presumably underlie these various very serious charges.

Transcript of Pretrial Hearing, September 6, 1961

The proceedings that have been had to date are as follows:

On August 1 the application for the taking of the deposition of Tool Company, through Mr. Hughes, was heard by Judge Murphy, and Judge Murphy decided that matter on the merits and denied that application.

On the same date that the matter was being heard by Judge Murphy, that is, on August 1, TWA served the Tool Company with new notices for the taking of depositions of the Tool Company through six other named officers, and at the same time also served a notice for the taking of the deposition of Mr. Hughes as a witness. This was served on us on August 1. On August 3rd, the defendant Tool Company for the [16] first time served its notices for the taking of the deposition of TWA, by certain named officers; of Dillon, Read, who were the investment house who promoted and brought about this 1960 financing; the Irving Trust Company, the notes agent; and the Metropolitan and the Equitable, who are the holders of the majority of those notes and are in control of TWA; and also Charles Thomas, who had been president of TWA up until the middle of 1960 and who was the last president of TWA prior to the acquisition and control of TWA by these lending institutions.

To understand the motion that subsequently was made by the Tool Company to stay the notices served by TWA on August 1 until after the completion of the taking of the deposition by the Tool Company, which came on to be heard by Judge Herlands, it is necessary to refer to the order of July 7th, which was entered by this court upon the consent of counsel between the parties and pursuant to an understanding which had been reached between counsel for TWA and myself.

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I have set forth that order on page 11 of this memorandum, but basically what happened was this, Judge: The parties decided to try to maintain the status quo between July 7th and August 1st. The [17] Tool Company recognized that normally a defendant is entitled under the Rules to serve a notice to take depositions within the first 20 days after the commencement of an action, whereas a plaintiff may not commence the taking of the deposition of the defendant, unless he should pose special or unusual circumstances. The parties wanted to maintain the status quo until August 1 so that the order that was submitted to the Court on July 7th and which was entered by the Court had the effect of providing that notice of depositions served after August 1 and before August 20th were to be deemed to have been filed or opposed, as the case may be, within 20 days after the commencement of the action.

However, because of the wording that was actually employed by the parties, the effect of it was, as Judge Herlands pointed out, to say that anything done between August 1 and August 20 was to be deemed to have been done after July 7 and before July 19.

Before Judge Herlands the plaintiff renewed its effort to establish special and unusual circumstances so as to entitle them to take the deposition of the defendant Tool Company, and particularly and the only effort that they pressed was that of taking the deposition of Mr. Hughes before giving the de-[18]fendants an opportunity of taking the deposition of the plaintiff and finding out what the actual facts are which underlie the allegations of this complaint.

Judge Herlands, in the course of the argument, asked both parties to submit proposed schedules for the taking of depositions, and this was done. The plaintiff submitted an alternating schedule commencing with their side to take

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the deposition of Mr. Hughes first, and then they gave us an opportunity to take the deposition, and they submitted that kind of a proposal of alternating schedule.

We submitted a memorandum pursuant to their request, where we pointed out that we had made a motion to dismiss the complaint or a motion for summary judgment. It is a motion made under Rule 12(b) and Rule 56(b). And we felt that a response to that motion to dismiss would have the effect of delineating the issues raised by the plaintiff, the issues of fact outlined in the complaint.

Judge Herlands, in his decision, in effect rejected both the suggestions that were submitted by counsel and held that the taking of depositions by the plaintiff pursuant to the notice that they had served should be stayed until the defendant Tool Company [19] shall have completed the taking of depositions pursuant to the notices which said defendant served on August 3, 1961, and the memorandum of the decision constituting an order of the Court. Judge Herlands found that by force of this understanding of counsel in the order of July 7, 1961, the notices which had been served by the defendant Tool Company should be deemed to have been served prior to plaintiff's notices, and he said that the positive issue was whether the record before the Court evidenced special circumstances warranting a departure by this Court in his discretion from the general rule, and he held that "the plaintiff has not made such a showing. The Court will adhere to the general rule. So ordered."

Following this decision by Judge Herlands, which came down on August 14, 1961, the Tool Company on August 18 served some additional notices for the taking of the depositions of certain additional financial institutions that had been involved in the December financing as part of the

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group now in control of TWA, and it also served notice of the taking of the depositions of the voting trustees named by those lending institutions, and also served a notice for the [20] taking of the deposition of the Boeing Company, and the relevancy of the Boeing Company will become apparent in just a moment, your Honor.

The practice followed by counsel for the defendant Tool Company, your Honor, was to serve notice for taking depositions and then to serve subpoenas duces tecum for the production of documents on the return day of the notice of taking depositions. We believe that such a procedure is not only permitted under the Rules but that it avoids the necessity of burdening the court's calendar by making a motion under Rule 34. When we follow that practice, the person is served with a subpoena and will produce documents as soon as he reasonably can do so and we will have an opportunity to examine those documents in order to expedite the actual taking of depositions; we examine the documents and arrive at a mutually agreeable date for the actual taking of the deposition after the documents have been examined.

We are quite cognizant of the fact that a similar result may be obtained by a proceeding by motion under Rule 34. That is a practice that we followed subsequent to Judge Herland's decision.

I should have indicated that prior to [21] Judge Herland's decision, immediately following our motion to dismiss, we wrote a letter to counsel for TWA requesting documents relating to the approvals by CAB. I have annexed as an exhibit to this memorandum our letter dated August 10, 1961, and the reply we received on August 11, 1961, by Mr. Sonnett. The interesting part of that reply, your Honor, is the last sentence of the second paragraph,

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which in effect says that they did not believe that they would be in a position to make documents relevant to the subject matter of the motion to dismiss available to us. One of the reasons given was the pendency of the decision by Judge Herlands.

At the same time, after the decision by Judge Herlands, counsel for TWA, and notwithstanding Judge Herlands' decision, which I think makes it perfectly clear that defendant Tool Company was to have priority in discovery proceedings, made a motion under Rule 34 for the production of documents by the Tool Company. I believe it is well established in this court that once priority for the taking of depositions has been established for one side, that the other side may not, until completion of discovery proceedings which priority affords to the one party, try to require the [22] production of documents by the other party. This motion is one which Mr. Sonnett referred to a moment ago as being pending. It calls for the production of documents as soon as possible and not later than some date in October.

We have not yet had an opportunity to file papers in opposition to that motion. Quite apart from the fact that it is premature by reason of certain documents called for, and so far as that motion is concerned and a schedule is concerned, any time convenient to the Court and the parties, the motion may be made returnable at any time so long as we have been allowed to submit some papers in opposition. As far as I can see, there is no urgency for hearing that motion or deciding it.

The next thing that took place, your Honor, was an application by counsel for TWA under Rule 2(b) of the general Rules of this court, and this was made on August 17th, immediately following the decision by Judge Herlands. This brings us up to date in so far as the proceedings had in this matter so far.

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Now, what are the matters that are pending? Before going into the question of depositions, there is one thing which I would like to stress on behalf of the [23] Tool Company is that quite apart from the priority which Judge Herlands' decision has established, it should be recognized that Judge Herlands' decision also recognized that discovery proceedings by the Tool Company should commence independently of the motion to dismiss. I make it clear that we deliberately noticed the taking of the deposition of TWA to commence on August 23rd, and we noticed our motion to dismiss returnable on August 29th, and that was a fact that was clearly and forcibly brought to the attention of Judge Herlands in our memorandum submitted pursuant to a suggestion to submit a proposed scheduling of the taking of depositions.

We did that, your Honor, with a specific purpose in mind. We believe that it is important to the Tool Company that we commence the taking of depositions as soon as it can be reasonably arranged, having in mind whatever work may be required, although, as I point out, I don't believe there will be any burden upon either TWA or its counsel to commence with the taking of depositions fairly promptly.

The need of the Tool Company for the commencement of the taking of depositions, I have attempted to set out commencing at page 17 of this memorandum [24] submitted to your Honor, and it may require some explanation by me, and, of course, I will be very happy to expand on what we point out there.

I should point out that we have not yet, that is, the Tool Company has not yet, filed its our answer to the complaint, and I think it only fair to state that when we file an answer, we will have to assert some counterclaims against TWA and others. We have the problem of both compulsory counterclaims and permissive counterclaims. What I have

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done beginning at page 17 is to indicate the seriousness of the counterclaims or claims that the Tool Company must consider asserting in this action.

I think it only fair also to point out that when this complaint was unsealed, there was a great deal of publicity with respect to the commencement of this action by TWA against its owner, Tool Company, and it is to be anticipated that the answer to be filed by the Tool Company and any claims which may be asserted by the Tool Company are likely to receive widespread public interest, and it seems to the Tool Company that we ought to be fairly sure of our facts before asserting such claims.

Now, we recognize, of course, under the [25] Rules it is not necessary to proceed in that manner, but we believe in this situation it is important for us to proceed in this manner. The reason I am emphasizing that, your Honor, is to point out that the taking of the deposition and the commencement of the taking of depositions in this matter is not related to the existence or the lack of existence, or whatever you may decide with respect to the motion to dismiss. It seems to me the procedures we ought to follow with relation to this motion to dismiss should be discussed and decided by your Honor after we have received the opposing papers.

Now, we filed our motion and our supporting affidavits on August 9. I am quite confident that counsel for TWA is prepared to file opposing affidavits immediately. I am sure that most of the facts they want to set forth must have been considered before they prepared the complaint, and I am sure they will have no difficulty in stating whatever facts they have which support the allegations of this complaint. Once we see what those are, we will be in a position of determining what issues exist in so far as the complaint is concerned.

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I will be surprised if counsel for TWA [26] does not raise some facts which will require, or some issues which will require, clarification through the normal process of oral depositions.

I made a reference to the fact that the complaint charged with one of the antitrust laws was the fact that the Company proposed or negotiated a proposed merger between Northeast and TWA. I want to point out in that connection that that proposed merger was one which by its terms was subject to CAB approval. By its terms it was also subject to approval by a majority of the minority stockholders of TWA, and because the Atlas Corporation is an investment company, it also was subject to a finding by the Securities and Exchange Commission that the transaction did not involve any overreaching and was fair.

However, the contentions in this complaint relating to Northeast and Atlas have some corollary repercussions. The Tool Company also has a substantial investment in Northeast. It advanced to Northeast in May of 1960 over \$9 million.

Northeast Airlines is presently involved in a proceeding before the CAB involving obtaining a permanent authorization of its New York-Florida route. It is encountering, as was to be anticipated, some [27] rather strong and, may I say, perhaps bitter opposition on the part of some competing airlines, and there is no question that those competing airlines are capitalizing right now and will continue to capitalize on the allegations of this complaint that Northeast was involved in an alleged conspiracy to violate the antitrust laws. The seriousness of that contention, your Honor, is that, if there be any basis for contending a violation of the antitrust laws, it necessarily must mean either that some secret transaction took place, of which I assure your Honor that the Tool Company is wholly unaware,

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which required CAB approval and for which CAB approval was not obtained, or somehow or other the facts submitted to the CAB by TWA, whose files we do not have access to, even though we own 78 per cent of TWA, are the basis for a contention that the approval of the CAB is to be disregarded, vitiated in some manner undisclosed to us.

The allegations of this complaint require, so far as the Tool Company is concerned, that we proceed as promptly as we possibly can for developing the facts, the facts that justified these allegations, and in the last section of this memorandum we have submitted we have suggested a schedule as to pending matters. It [28] is roughly in—my associate, Mr. Cox, has just reminded me that I forgot to mention one very important point for the commencement of the taking of depositions, and that is that the Tool Company is very much concerned to consider the possibility of it seeking some special equitable relief in connection with the so-called Boeing transaction and its financing. Since this is one of the matters alleged in the complaint as wilful and malicious conduct on the part of the Tool Company on the assumption that the Tool Company, notwithstanding 78 per cent ownership of TWA, was seeking to hurt TWA, the situation is the following:

Since December 31, 1960, the persons in control of TWA decided to commit TWA for the acquisition of some Boeing jet aircraft at a cost of some \$180 million. At the same time they rejected the possibility of acquiring some 13 Convair jet aircraft which had been ordered by the Tool Company pursuant to the usual past practice of ordering aircraft for TWA when TWA was not itself in a position to order itself or finance, and in order to assure prompt delivery it had been the practice of the Tool Company to order the aircraft and subsequently make them available to TWA. In order to finance this \$180 million of jet aircraft, it was

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dis-[29]closed in a registration statement, which became effective in May of 1961, that TWA was about to commit itself or had committed itself or intended to commit itself to borrow some \$147 million from the same lending institutions who are in control of TWA. At one time I believe it involved the addition of one additional insurance company, Prudential, and I was told it withdrew leaving the identical lending institutions.

In any event, it appeared that TWA intended to negotiate with those lending institutions the borrowing of some \$147 million toward this \$180 million obligation that we were going to incur with Boeing. At the same time it was disclosed that one of the terms and conditions of that borrowing was that in the event the voting trust would terminate for any reason, that is, the voting trust that was imposed upon the Tool Company, and the circumstances, which is another story, relating to the \$165 million borrowing, the same lending institutions were insisting apparently on terms and conditions that an additional \$147 [million] long-term debt would immediately mature and become due and payable by TWA should the voting trust terminate for any reason.

The voting trust, by its terms, terminates [30] at any time that the money borrowed at the time it was created is refunded or the lending institution repaid. It is true that they impose a 22 per cent penalty on the Tool Company if the Tool Company tries to repay it, but they have a right to repay it. It was the position of the Tool Company therefore that this proposed new financing, which appeared to us to involve self-dealing, or at least terms, lending terms, which are not competitive, also involved the possibility that as a practical matter these lending institutions were about to lend money under terms which would have the effect of

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continuing this voting trust for a period longer than originally intended.

TWA refused to furnish to the Tool Company any information with respect to those negotiations. It even refused to furnish that to Mr. Holliday.

We have read in the newspaper recently that some financing was consummated by TWA; the newspaper account merely said that the lending institutions involved were not identified, and we do not know what the terms and conditions of that financing are and whether or not any of those objectionable terms and conditions I referred to in fact exist today.

Obviously, there may be some equitable [31] relief that we may seek, and before we are, of course, in a position of taking such steps, we must obtain the facts, which we propose to do by commencing discovery proceedings as soon as possible.

I suggest a general schedule, your Honor. We believe that TWA should promptly serve its papers in opposition to Tool Company's motion to dismiss. Presumably TWA's counsel, already having made a detailed investigation of the facts prior to the filing of the complaint on June 30, 1961, is prepared to respond to said motion which he made on August 9th. I think it is to be expected that such response will have the effect to delineate the factual issues underlying the allegations of the complaint. Then it seems to me, your Honor, that we ought to fix an early date for the production by TWA of the documents we have called for by our subpoena served on TWA on August 16th.

It seems to me that those documents should be readily available for production inasmuch as presumably they have been gathered by special counsel for TWA in connection with their investigation which resulted in the commencement of this action.

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Then it seems to me that we ought to agree [32] upon the earliest possible convenient date for the commencement of the taking of depositions by the Tool Company and we propose [to] commence by taking the deposition of TWA.

Then it seems to me, your Honor, that is one of the matters which has been held in abeyance pending a referral of this matter to your Honor. We have been interrupted as a result of TWA's application to Chief Judge Ryan with the completion of the service of subpoenas duces tecum on persons whose depositions are to be taken as witnesses. They are as witnesses at the moment; some of them are potential cross defendants.

I submit that it would be helpful to permit us to proceed promptly to serve those subpoenas duces tecum so that the person served may have as much time as possible to respond to the subpoena and so that we will not waste any time when we are ready to take their oral depositions.

Plaintiff's motion for the production of documents under Rule 34, as I previously indicated, may be set down for hearing at any time that is convenient to your Honor and counsel for the plaintiff. I don't believe that there is any urgency for the determination [33] of that matter, but if counsel for TWA feels that there is, we will be prepared to oppose that on any reasonable notice.

Then it seems to me that after we have received the papers in opposition to the motion to dismiss, then we will be ready to give consideration to an appropriate date for a hearing on the motion to dismiss, if that course of action appears to be the one that might be the most productive for an early disposition of the issues involved in this case. It took an awful long time to describe this, your Honor, but I hope it has been helpful.

The Court: Mr. Sonnett?

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Mr. Sonnett: Your Honor, with reference to the specific program suggested by counsel on page 22 of his memorandum, as your Honor knows, Judge Ryan agreed that, despite the heavy burdens on your Honor and other judges in this court, this was a typical big case that needed to be administered by one judge, and I think in the interests of saving the Court's time and in the interests of the parties—we are happy to be before you as the judge who will supervise the pretrial and will try the case—I don't think your Honor wants to hear from me about the merits of any of these problems [34] until such time as the record is ready for presentation to your Honor.

On the specific program I can be in a position to serve the opposing affidavits on the motion to dismiss and for summary judgment by next Wednesday. We have had some problems at TWA recently. I think all will recognize that it has been rather extraordinary; it has been a little difficult to get to the chief executives to finalize the affidavits, but we can serve and file the opposing affidavits and our brief on Wednesday next.

As for step two suggested by counsel, production of documents by TWA, we are prepared to start producing for inspection tomorrow morning, and counsel may proceed with inspection of the documents, which are very voluminous, called for by the subpoena duces tecum.

On the question of how long it will take us to complete a search for documents and for counsel to inspect them, we have some practical problems. I think one of the problems is whether counsel wants us to produce copies of, for example, printed contracts that I am sure Tool Company already has. We have problems about whether counsel really wants to see the contract [35] files of particular planes. One file alone is about eight feet, change orders in

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design and so forth, but their subpoena, while broad, we haven't objected and we will produce whatever it is in fact they want. We have a special office set up at TWA's offices, and counsel can send anyone he desires tomorrow morning at 10 o'clock and he can inspect and choose, or whatever he wishes to do. We have a practical problem about files of TWA located at Kansas City, which is the operations base and headquarters of TWA. Once counsel for Hughes Tool has looked at what we have in New York and has told us whether he wants us to produce, for example, these printed documents that they already have, it may be that what they ought to do is go out and look at them there, or, if they really want us to do it, we can bring them here.

Mr. Davis: There will be no problem.

Mr. Sonnett: They are very voluminous, that is my point, Judge. I will estimate that it will take counsel for Hughes Tool Company probably a minimum of two weeks to look at the documents that TWA will have here and at Kansas City. My best estimate is that as to the documents yet to be searched for in Kansas City, we will need probably three to four weeks. We have a [36] crew of six working on the document problem, so I would say, Judge, that it would take, for us to be in a position to say that we think we have fully complied with the subpoena duces tecum, perhaps we can shave it some with a crew of six—that would be my guess—a month.

Counsel can help to the extent that, having had a preliminary look at what we have at TWA, if he will then say, "Now, there are certain areas that you needn't bother producing," like the printed documents that they have, and so on, we would cut that job down and maybe get it done in two weeks.

As for the step three suggested by counsel, the taking of depositions, let me say before leaving documents that we

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most strongly recommend to your Honor that there be a production of documents by both sides before any depositions commence, because I think if there is, we will find that the length and scope of the depositions to be taken in due course by both sides will be very much narrowed. Otherwise, we are going to have a very real problem, I think, in the taking of depositions.

Hughes Tool has noticed, I think it is, 21 sets of depositions; for example, the top two men in [37] the insurance company and the banks and so on. The number of individuals involved in their notice, I am not sure, but I would say it is 30 people, or thereabouts. I think that if your Honor were to direct at the outset of this case that we get the documents under control before we start depositions, I think we are going to have a net saving of time on the part of everybody, particularly, I think, the outside people, banks, insurance companies, Boeing Aircraft, who, after all, are only witnesses.

So our request is that your Honor pass upon whatever the disputed items of our motion to produce may be. I don't know how much counsel will concede that we ought to have, but when we got up the motion to produce, we took the same items that he had in his subpoena duces tecum, we added some necessary references to the Tool Company and we added only one really new item, and that is the income tax returns of Hughes Tool for reasons which I suppose bear on this conspiracy which we will argue at length before your Honor because I am sure they will not give us the right to see that.

I would think if counsel would indicate to us the items that he would concede that we have a right to [38] see and indicate the ones that he wants to dispute and your Honor were to dispose of that document problem, because it does

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take time, I don't think it is in the interest of everybody to have the whole deposition thing start before we have the documents controlled. I think if we could get the documents out of the way in the next two or three weeks, with production by us and by them, and then turn to the depositions, adhering to the schedule which Judge Herlands has established, we are not suggesting any deviation from that, and then argue this motion to dismiss at whatever time your Honor desires to hear it, we will be prepared to argue it on the present record after depositions are taken, or whatever time it is convenient to the Court.

My only point on depositions is that, if counsel is going to want depositions to use in connection with his motion for summary judgment and to dismiss, I think we are going to need some too, because what we are complaining of in this complaint isn't anything that was authorized or required approval by the CAB. Counsel's argument is quite beside the point. There is no act alleged in our complaint that was authorized or required or approved by the CAB. [39] In due course your Honor will consider that and determine the question, but if he is going to want depositions to use on the motion for summary judgment, it seems to me that we ought to have a chance to show the other side of the coin, namely, the things that happened.

The Court: That is certainly in line with decisions of the Court of Appeals in this circuit.

Mr. Sonnett: So I would say, your Honor, one way or the other, if he wants to argue it on the present record, fine. If he wants depositions, we ought to have the record made so you can decide it on the basis of an adequate record.

The Court: How about 3: Tool Company should commence taking the deposition of TWA 10 days after the date

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fixed for the production of documents; you have no objection to that?

Mr. Sonnett: None whatsoever, your Honor. It is just a matter of administering the document problem.

The Court: What about 4: Service of subpoenas which were interrupted?

Mr. Sonnett: I think this has to do really with the convenience of these 30-odd people who were noticed as witnesses, these being banks and insurance [40] companies, aircraft companies scattered all over the country. I would think that as a matter of not interrupting any more than necessary—

The Court: I don't see how 4 is a problem, Mr. Davis.

Mr. Davis: It is not, your Honor. I just mentioned it because, as things now stand, we had an understanding that we suspended the service of those pending a reference of this case to your Honor, and I just wanted to point out that it is a matter pending in the sense that we ought to have an understanding that from this date forward we are free to resume the service of those subpoenas, and, so far as the convenience of the parties is concerned, of course we will cooperate in every way possible to fix dates, or whatever date that was originally fixed, or some date convenient for those concerned.

The Court: Have you coupled the motion for summary judgment and the motion to dismiss?

Mr. Davis: Yes, your Honor.

The Court: It would seem to me that in view of our decisions here in this circuit, your opponent should have the opportunity of depositions before your motion is passed upon.

[41] Mr. Davis: No objection. So far as the motion to dismiss is concerned and the motion for summary judgment,

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the only suggestion we made is that after we receive these answering affidavits next Wednesday, and I quite agree, perhaps the thing should be postponed for a determination until the parties are ready to have it heard on whatever documents he needs or we need. I have no objection to that.

The Court: I am just saying at this writing, pursuant to the cases in our Court of Appeals you would be in a very bad position to win your motion; plaintiff merely saying, "I haven't had an opportunity to take depositions," and automatically your motion would be denied.

Mr. Davis: That is why I have suggested the commencement of the taking of depositions should be independent of and not related to this motion to dismiss.

The Court: I don't know how you are going to set that up. If the Court decides the motion to dismiss is really a summary judgment, you are back in the other box again.

Mr. Davis: That is why I suggested, your Honor—

[42] The Court: Suppose we do this: You say plaintiff's motion for production under Rule 34 for documents should be set down for a hearing at any time which is convenient to the Court after you have had an opportunity to submit papers in opposition.

Let's take that one first. What time do you want to submit your papers?

Mr. Davis: Well, I think if we had a week's time to submit papers in opposition—

The Court: Take any time you want. Today is the 6th. September 13th.

Mr. Silverman: With the holidays Monday and Tuesday, your Honor, I think maybe we had better postpone it a little more.

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The Court: Let's put it over to Monday, because I have to go to the Judicial Conference. Do you want to have argument a week from Monday on this motion?

Mr. Sonnett: I would like to see their opposition papers a day in advance of argument.

The Court: We can set it down for argument a week from Monday, that is the 18th. Could you have your papers in Mr. Sonnett's hands by Friday morning at 10 o'clock?

[43] Mr. Davis: Sure.

The Court: That gives you eight or nine days.

The gentleman sitting on your right doesn't seem enthusiastic.

Mr. Silverman: One can hardly be enthusiastic about a lot of work, but we will get it out.

The Court: You might as well get started on the right foot and have everything in.

Mr. Silverman: I shouldn't think there will be any difficulty about that.

The Court: September 15th, 10 a.m., for service of papers; all right?

Mr. Sonnett: Yes, sir.

The Court: I think that should be the first step, and at that time I will be prepared to rule on your item 3 as to whether the production of documents by Toolco should proceed abreast of their taking of depositions. In the meantime you can commence, as I understand it from Mr. Sonnett, the examination of documents which have already been collated, and by September 13th—or do you want to make that the 18th also, Mr. Sonnett; give you to September 18th to serve your papers in opposition?

[44] Mr. Sonnett: I would prefer it, Judge for the reasons that I have indicated.

The Court: Make it September 18th.

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Mr. Davis: May I make a suggestion on that, your Honor? It seems to me that our opposition and the effectiveness of considering the issue as to the scope of the documents they are requesting of the Tool Company on their motion 34 will be greatly assisted once we see what it is they are claiming as the underlying facts of the complaint. The problem we now have, your Honor, is that we have a 38-page complaint, but after your Honor has had an opportunity to look at it, you will find it tells you very little other than conclusions.

The Court: That is shorter than the one I have in the minority stockholders case in DuPont, on the same problem of General Motors, exercising its 21 per cent interest.

Mr. Davis: That is why I am suggesting, your Honor, that once we have, even though we may not dispose of the motion for summary judgment—once we have these answering affidavits, which at least set forth the factual contention, it is almost answering a bill of particulars, it is going to give them an [45] opportunity to tell us for the first time what we have been doing that has not been approved by the CAB.

The Court: And you would therefore be able to narrow your request for documents.

Mr. Davis: Conceivably, except we have the problem of the counterclaim, as I indicated before, but certainly it would permit us to understand the reasonableness of their request for income tax returns.

That is the thing we are primarily opposed to. The rest of the stuff we are not opposed to. That is really what the thing is going to come down to. That is what is basically the justification for their trying to probe into that, and I assume it is not for the purpose of embarrassing the Tool

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Company or Mr. Hughes, and the reasonableness of that, your Honor, will become—we can focus on it once we or after we have received these papers in opposition, so I would suggest, whatever the dates are, the fact is, I was thinking, when I was suggesting it, I wondered if I could spend some time with my family and children before September 20th, but what I would suggest, however, is that a consideration on our opposition to their [46] request for documents, apart from the fact that it is premature, as we contend, will be greatly facilitated and the issue sharpened if we have received at least a week or 10 days before whatever it is that they are going to lay out for us as being the factual foundation of their complaint, and then we will see what the reasonableness of what they want is.

Mr. Sonnett: May I suggest, Judge, that what counsel is saying has nothing to do with our rights for production of documents. I think your Honor will look at the complaint, the allegations of the complaint, and determine whether we are asking for documents which are relevant to the general subject matter and whether we have good cause. I am prepared to argue the matter of the income tax returns at your Honor's convenience, to submit the authorities and the reasoning.

Our point about the tax returns is that we think that a principal motivation of Hughes Tool for becoming a supplier of aircraft, which it became, was because Hughes Tool had some problems. It threw off so many millions of dollars a year and Howard Hughes was saved from paying; if they paid it out in dividends, he would pay 92 per cent. What they deliberately did [47] was to create matters of convenience for the Tool Company and this led to a lot of the things that they did with the captive TWA.

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I will be prepared at your Honor's convenience to submit the cases. I don't think these affidavits we are going to submit really have anything to do with the question of whether our motion to produce is well founded, nor the allegations of the complaint.

The Court: Let's make the same date, September 18th, for the motion to dismiss and on the motion for production of documents. Serve your papers on Friday.

Mr. Silverman: Was your Honor making September 18th the date for argument of the motion to dismiss?

Mr. Davis: No, the motion for production of documents.

Mr. Silverman: The Court, I think, was suggesting the argument of the motion to dismiss on the 18th.

Mr. Davis: No, your Honor, I don't think we would be ready to argue the motion to dismiss on the 18th.

[48] The Court: Is this the one that was on my calendar on August 22nd?

Mr. Davis: August 29th was the first return day, I believe.

Mr. Sonnett: It was either this motion to produce or the other one, I am not sure, Judge.

Mr. Davis: No, the motion for summary judgment was first made returnable August 29th. I am quite confident that is right.

Mr. Sonnett: But at that point, your Honor, we were going to apply for an adjournment and extension of time because, your Honor, I strongly believe that what your Honor indicated a little earlier, and that is the determination of this motion to dismiss or motion for summary judgment in whole or in part—

The Court: I will reserve the motion indefinitely. The motion to dismiss may be able to be disposed of on what you have submitted. If, on the other hand, what comes in

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I have to consider as a motion for summary judgment under Rule 12, I cannot put it over, but I cannot tell until I see the papers.

Mr. Davis: That's fight. I want to say quite frankly I thought I made it clear in my opening remarks, we are not prepared to permit this to [49] be dismissed until we have decided what counterclaims we want. I would rather withdraw it if it is going to cause any confusion.

It seems to me the motion to dismiss the complaint is a motion which was warranted based upon the affidavits we filed in support of it. I think we ought to find out what it is that the plaintiff claims as a basis for their complaint, and after we see that, then I think we will be—conceivably we will be willing to say all right, if that is your position, there is a pure question of law involved. I don't anticipate that, your Honor, and I would be less than frank with your Honor if I didn't say that. When I see the opposing papers on the weekend before September 18th, I will withdraw the motion and renew it when we are ready to establish the fact.

I am sorry if I spoke this late on the thing. I thought your Honor was still addressing yourself to—

The Court: I was trying to bring them both in together.

Mr. Davis: No, I think the motion for the production of documents by the Tool Company is a motion which we believe is premature based upon the [50] firmly established precedents of this court, and I think it is up to TWA to show some overwhelming reason why they need those documents.

The Court: I would conceive it is to cross examine the witnesses whom you have subpoenaed on their depositions of them. This is a perfectly valid reason for looking at them.

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Mr. Davis: I think we may come to that point, your Honor.

The Court: Let's do it this way: I think perhaps that you can hold off your motion to dismiss at the present writing and let's go on to the production of documents and keep the schedule, and that is September 10th—

Mr. Silverman: 15th, I think you said, sir.

The Court: —September 15th at 10 a.m.

Mr. Silverman: For opposing papers on the Rule 34 motion.

The Court: That is right. We will argue it on September 18th at 10:30. I don't know the courtroom yet. We will have to find out.

All right.

Mr. Sonnett: Yes. May I, your Honor, I have a commitment to Judge Cashin in a cartel case [51] and I don't know the date, but if I am not able to be available, my partner, Paul Williams, can do it for me.

The Court: There is a holiday that week, too, isn't there, Wednesday?

Mr. Silverman: I think the 11th, 12th and 20th are Jewish holidays.

Mr. Davis: I have no objection to putting it over past the 20th. In fact, I would like it.

Mr. Sonnett: I am sure you would like to put it off forever, but we have to get on with the case.

The Court: There is an earnest plea for progress in the case.

Mr. Sonnett: I am in favor of that, Judge. We are desperately anxious to get this case tried. I hope we can do it.

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Mr. Davis: We will cooperate in that respect.

The Court: How about the 21st, if you have no serious objection?

Mr. Sonnett: No.

Mr. Davis: Since Mr. Williams has just appeared for the first time today, we can put it over [52] when you are available.

Mr. Williams: This is not the first time I appeared in this case.

Mr. Sonnett: Mr. Williams appeared when we filed the case. He wouldn't be with me on the case, but he is taking some of the load. But as to the dates, the 21st is all right with me.

The Court: Are you sure of that holiday date, the 20th, Wednesday?

Mr. Silverman: I am almost sure.

The Court: Make it Thursday, September 21st, and you can file your papers then by Monday, the 18th. That will give you three working days.

Mr. Sonnett: Thank you, Judge.

The Court: September 18th for the service of papers. All right.

Mr. Sonnett: Thank you.

Mr. Davis: We will delay the commencement of depositions until after the 21st date.

The Court: Yes.

Mr. Silverman: And the motion to dismiss is held off?

The Court: Held in abeyance.

Mr. Davis: Thank you, your Honor.

Pretrial Order, September 7, 1961

[Doc. 44]

[CAPTION]

61 Civ. 2324

ORDER

A pretrial conference was held in this cause on September 6, 1961, wherein the following proceedings were had.

I.

The following counsel were present representing the plaintiff:

CAHILL, GORDON, REINDEL & OHL, Esqs.,
JOHN F. SONNETT, Esq.,
PAUL WILLIAMS, Esq. and
CORYDON B. DUNHAM, Esq.,
Of Counsel.

The following counsel were present representing defendants:

CHESTER C. DAVIS, Esq.,
Attorney for Hughes Tool Company,
RAYMOND COOK, Esq.,
PETER M. FISHBEIN, Esq.,
MAXWELL COX, Esq.,
JAY H. TOPKIE, Esq. and
SAMUEL J. SILVERMAN, Esq.,
Of Counsel.

Pretrial Order, September 7, 1961

II.

Plaintiff TWA has already gathered some of the documents called for by the subpoena duces tecum served on TWA on August 16, 1961 by defendant Hughes Tool Co. TWA shall continue gathering the material called for by this subpoena duces tecum and shall complete compliance with the subpoena by Friday, October 13, 1961. Defendant Hughes Tool Co. may commence the inspection and copying of said documents on September 7, 1961.

III.

Plaintiff's motion pursuant to F.R.C.P. 34 shall be argued on September 21, 1961 at 10:30 a.m. in chambers. Defendant Hughes Tool Co. shall serve and file its papers in opposition prior to 10 a.m. on September 18, 1961.

IV.

The question as to when defendant Hughes Tool Co. shall commence taking depositions and when it shall comply with any order entered on plaintiff's motion pursuant to F.R.C.P. 34 will be argued in conjunction with said motion.

V.

The motion by defendant Hughes Tool Co. to dismiss the complaint pursuant to F.R.C.P. 12 and for summary judgment pursuant to F.R.C.P. 56 shall be held in abeyance. Said defendant shall notify the Court when it desires the motions to be heard. A date will then be fixed for the serving and filing of papers in opposition and argument on the motions.

A-2114

Pretrial Order, September 7, 1961

VI.

The service of subpoenas by defendant Hughes Tool Co. may continue.

So ORDERED.

Dated: New York, N. Y.
September 7, 1961.

/s/ CHARLES M. METZNER
U.S.D.J.

Transcript of Pretrial Hearing, October 2, 1961

[Doc. 48]

[CAPTION]

61 Civ. 2324

Before: HON. CHARLES M. METZNER, District Judge.
New York, October 2, 1961, 10:30 a.m.

[APPEARANCES]

. . .

[2] Mr. Sonnett: Good morning, your Honor. I do not know whether the Court had an opportunity to read our reply papers which, unfortunately, I ground out over the weekend and could not serve and file until this morning.

The Court: I did not.

Mr. Sonnett: Your Honor will find that we have submitted two memos of law. I would like to explain why two, briefly. One is our reply memorandum in connection with the motion for production, which is the pending matter before your Honor. The second is a brief with respect to the defendant Tool Co.'s claimed defenses.

The reason for the second brief, may it please the Court, is that Tool Co. suggests from time to time in its papers that it has some defense to the complaint here. It hasn't yet tendered that defense for decision. The motion to dismiss, as your Honor will recall, is pending, and we don't have an answer yet in the case, but the repeated suggestion of this alleged defense of exemption, it seemed to me, required us to set forth in a brief what our position is as

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plaintiff. We have done that in the brief with respect to defendant Tool Co.'s claimed defenses. [3] I hope your Honor will find it of some assistance in understanding the plaintiff's theory of the case.

In so far as the motion for production is concerned, your Honor, the opposing papers, as I read them, concede our right to the production of all documents which we seek except financial records and income tax returns, and the opposing papers take the position that the time of production should be deferred until after the Tool Co. has completed its scheduled depositions.

Our position is that the papers should be produced promptly, all of them, including the financial records and tax returns, and that they should be produced prior to the commencement of the depositions.

I think the basic ground of distinction in this case from some of those, in fact I think all of those, relied on by the Tool Co. is that we have a total of something over 25, I think, witnesses to be examined by the Tool Company. Four are TWA executives. Over 20 are outside witnesses. The subject matter of the examination of all of the outside witnesses will be directly connected with the matter of financing of aircraft, with the motives, purposes, intent of the Tool Company in doing what it did do and how [4] it did it.

Our cross-examination of these witnesses cannot be successfully done or completed until we have the Tool Company documents. We are not seeking to interfere with their priority of deposition. Rather, we are trying to make the depositions shorter and more meaningful when they occur.

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So I submit, your Honor, on the basis of the allegations of the complaint, on the basis of the needs in this case for administration, the fact that we are about to commence an extensive program of depositions, that the time to get rid of the document problems is now. We shall be confronted with very real, practical problems otherwise.

The 25-odd witnesses are to be examined in New York, in California, in Pennsylvania and in the State of Washington. If we are going to be running into—and I suspect we will unless this Court takes action to prevent it—controversies about document problems on the one hand, necessitating an appeal back to this Court or perhaps to other courts, the problem will be compounded. If we are going to be in a position as plaintiff where our cross-examination of these witnesses will have to be [5] reserved at least in large part until we see the Tool Company documents, it just means an additional burden on 20 outside witnesses and on the parties and, I might add, I think on the Court as well.

As for the financial records, including tax returns, your Honor will note on examination of the complaint that we charge that the specific motivation of the defendants was to so dominate and control TWA as to achieve the maximum benefit for the defendants themselves. This was and is a case of a deliberately calculated purchase for control by the Hughes Tool Co. which assumed the role of supplier of aircraft and which dictated the times and places and terms on which TWA could get the aircraft it needed. It is that which is at the heart of our case.

We believe that the financial records of the Tool Company, including their tax returns, will establish that the

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specific motivation for doing things the way they did do them, with the result, I believe, of a clear violation of the antitrust laws, was a tax motivation. We submit, your Honor, that the cases which we have cited in our reply memorandum are directly authoritative on the matter of tax [6] returns in a case such as this, and I refer particularly to the cases cited at pages 8 and 9 of our reply memorandum.

I think, your Honor, that outlines our position. I have nothing further at this time. I would like a few minutes in reply, though, if necessary.

The Court: Mr. Davis.

Mr. Davis: Your Honor, this is the third time that TWA in one way or another has attempted to embarrass the Tool Company by trying to do something out of turn.

The first time was when they filed this complaint under seal and at the same time obtained an order to show cause to take the deposition of Mr. Hughes within seven days after the filing of that complaint. That attempt failed before Judge Murphy.

The second time that they tried to again find some reason for embarrassing the Tool Company was when they tried to commence taking depositions before giving the defendant Tool Company an opportunity to find out what it is that they are really claiming. That attempt failed before Judge Herlands when he decided that the defendant was entitled to priority. [7] It is perfectly clear, and counsel for TWA knows, that once priority has been established under Rule 26, it establishes the priority for discovery under Rule 24.

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The issue, therefore, is what is the special circumstance here, if any, to justify the plaintiff, who presumably knows what he is suing about, to have access to the records. The first statement Mr. Sonnett makes is that we concede that what they seek is relevant. That is not true. What we have said is that we have no objection to that portion of the request for documents that they have made which they have justified only by saying: the defendant asked for these documents, so we are going to ask for the same things in reverse; and we have said: you can have all the documents we have when your turn comes.

The only thing we are really objecting to in so far as the production of documents is concerned is the financial statements of the Tool Company and its income tax returns, and I would like to address myself to that for a moment, if I may.

TWA well knows the sensitivity that the Tool Company has had over the years to public [8] disclosure not of the kind of financial statements we normally think about, in the form of annual reports, which most corporations normally make available to their stockholders. TWA knows and the persons in control of TWA know, because that includes lending institutions who have obtained, on a confidential basis in connection with some other transactions, detailed information about the Hughes Tool Company, that our financial statements contain a lot of detailed information which would hurt us to disclose. Therefore they find it extremely important to obtain them.

Motivation. Motivation about control: It is admitted that we acquired control of TWA and that TWA became a

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subsidiary of the Tool Company. It is admitted that this was done with the approval of CAB, whatever the reasons. So we controlled TWA. It is admitted.

What is the motivation as to why we acquired control of TWA? Was there a tax reason why we were willing to come to the assistance of TWA when we did it at the time we did it, which permitted CAB to approve our acquisition for control of TWA? What relevant intent does that have under the antitrust laws? None, absolutely none.

[9] This is quite apart from the fact that the only tax intent which is referred to in the moving papers is a so-called desire on the part of the Tool Company to avoid the consequences of an unnecessary accumulation of funds. Well, I don't know of anything unusual about people not wanting to pay any more taxes than they have to, to be sure. But it isn't even true. On the face of it it isn't true.

It is perfectly well known that once TWA became a subsidiary of the Tool Company the cash requirements of TWA, as well as the cash requirements of the Tool Company and all its other enterprises, were pertinent issues for this tax question, and therefore it makes absolutely no difference whether TWA was financed one way or another, whether we did it by committing our credit to acquire equipment and subsequently made it available to TWA or whether we did it in some other way, absolutely irrelevant.

I submit, your Honor, that TWA knows that and that there is absolutely no justification which has been shown whatever for attempting to embarrass the Tool Company. The Tool Company is defending itself against what? Against a 38-page complaint [10] that states a lot of con-

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clusions. I can make the allegations of that complaint by looking at any form book. But when we asked TWA to specify just exactly what it is that they claim we have done which is outside the scope of the CAB orders, there is a dead silence.

As to the underlying issues, I want to refer to this although it is a sort of digression because I think it is pertinent to what we are here for today because it was mentioned in your Honor's pretrial order. We attempted to bring out what are the real underlying issues here by bringing on a motion to dismiss with an affidavit in support of our motion. We could have proceeded in other ways, perhaps, but that is the way we decided to proceed. That was done so as to give TWA an opportunity to respond with opposing affidavits which would presumably state facts, not counsel's educated wording of the complaint, facts in an affidavit.

Presumably TWA is claiming that we have done something contrary to the approval of CAB, which was obtained. But what we have done contrary to the approval of CAB is to remain a deep, dark secret. [11] At least today we don't know. And it is difficult to address one's self to the relevancy of the needs of TWA to prosecute this action which they have commenced, presumably based upon some facts they know, since we cannot find those facts out.

That is one of the reasons why we believe the normal rules of this court should prevail here. We are the defendants. We have obtained priority in the taking of depositions. We want to pursue the taking of depositions and find out what the facts are that the plaintiff knows, not

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what counsel argues. Then we will have something tangible before us.

In the memorandum that was served on us today reference is made to the number of lawyer hours that would be involved in what has already taken place, in the production of documents, in the possibility of making this a very, very big case. It is true that a great many lawyer hours have been spent since the last time we were before your Honor and TWA presumably has been producing documents by the carload. We have been told by counsel for TWA that all the documents we have requested will be furnished to us on or before October 13th but that they will have to [12] determine the order in which that material is made available to us.

Do you know what has been made available to us, your Honor, to date? We have had some men in Kansas City because we were told that is where the documents were, and there we get reams of files that give us all the detailed changes and specifications of all the aircraft ever acquired by TWA from the beginning of time. Every time a screw was changed, we get all the specifications, reams of files. When we say we would like to get the files which constitute the applications to CAB for approval of what we have done, "We'll provide everything in good time."

You see, your Honor, the peculiar situation is that when the Tool Company was in control of TWA the applications for approval that were submitted were prepared by TWA and its general counsel, and the Tool Company does not have those files. Those were done by a subsidiary.

Comes the beginning of this year 1961 and some persons acquired control of TWA under circumstances which will

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be the basis of a great deal more by way of answer and counterclaim, we suddenly find ourselves without any files whatever. When we wrote a [13] letter before this discovery proceeding was started, we were told that access to those files would be made available to us in due course in connection with discovery proceedings.

Mr. Cox calls to my attention that we have seen CAB applications. I was not referring to the bare application itself. I was referring to the files which contain the information we submitted to the CAB.

When we asked for the files which related to the financing and the proposed financing which is taking place, we were furnished with the printed documents, but the files which disclose what negotiations took place, who insisted on the provision referred to in Mr. Holliday's affidavit, which is an obvious effort to perpetuate those in control beyond the term of the original arrangement of December, 1960, that is not yet available for us.

I submit, your Honor, if counsel for TWA anticipates a great many lawyer hours in the production of documents for discovery proceedings, a great deal of that, to be sure, will be within their control, and we are not complaining about what has been taking place. The arrangement is that on or before October 13 we are supposed to have all those files, and we [14] will wait patiently until October 13, and presumably they are entitled to produce their files in whatever order they want to.

But I don't think that your Honor should get the impression that, since it was ruled that we were to have an opportunity to really commence the examination of TWA's files, we have made any progress to date in that connection. We have made very little, if any, progress, and, as I say, this has been solely within the control of TWA.

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Your Honor, I don't see that I can advance the proceedings very much by repeating what basically appears in Mr. Holliday's affidavit. I am fully conscious of the fact that on this kind of case the normal tendency is: well, they are asking for relevant documents. Let them have it. What harm does it do?

I urge your Honor to consider the very serious harm that the Tool Company will suffer if these people are going to have access, in a public matter, to those detailed financial reports which are never made available. The problem confronting us, your Honor, is that we happen to be a corporation which is owned by one man. As a result of that we do not prepare, we cannot respond to a request for, financial [15] statements of the kind or nature that most other corporations prepare, which just gives a generalized picture of what is taking place. The only thing we have in our files is statements which are prepared for the various operating heads.

In fact, within the Tool Company there is such sensitivity about the disclosure of the details of the operation of some of those divisions that even within the company an officer in charge of a particular division does not have access to the detailed financial information of another division.

So that the income tax returns contain very detailed information with respect to the operation of the business that, as the affidavit of Mr. Holliday points out, would seriously injure the company if that were to become public.

It is true that, when dealing with these lending institutions, we have at their request prepared financial statements which were furnished to them on a confidential basis. Included in those lending institutions is the Irving Trust

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Company. Irving Trust Company is one of the lending institutions now in control of TWA. What they have done with the information they received on a confidential basis [16] we are not in a position to say, of course, but the affidavit of Mr. Holliday indicates that there is some concern that maybe some of that information has been misused. If so, of course we have no means for redress. But we are very sensitive against making that information generally available.

In so far as the time when TWA should have access to whatever they are entitled to obtain, there is no question that we have no objection, although we don't concede the relevancy, to giving them all the documents that they ask for, whether relevant or not relevant, with the exception of those financial statements and income tax returns. But it is perfectly obvious also that we cannot be doing two things at once. We cannot be searching our files, our records to respond to the request of TWA which they admit copied ours. Presumably, if the defendant wants to know something about this matter, the plaintiff may ask for exactly the same information. They made no effort whatever to limit, for the purpose of immediate production, the kind of documents they feel they have to have right away, just the same broad thing. In fact, they say: all this we are asking for because the defendant [17] asked for it, just that bluntly.

It is perfectly apparent, your Honor, that, if we are going to make progress here—and we are the ones who want to make progress here; we want to make progress here because we believe there is a complaint on file here which is absolutely unsupportable and we want to get the facts out and we want to be in a position to dismiss this

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complaint, to stop this entire proceeding. We believe that it can be done without a trial. But, your Honor, a great deal depends on what contentions are made as to the facts, and the only way we know of is to go out and get them.

Therefore we want to start taking depositions as soon as possible. We want these people to produce the documents we have called for and permit us to start the taking of depositions without interference. Then, if, for reasons which I do not anticipate, things bog down through no fault at all of the parties, it seems to me that plaintiff can renew its application to this Court for such relief at that time as they need.

But my plea, your Honor, is that we want to start taking the depositions of TWA and start [18] finding out what it is they are really claiming we have done, and we don't want to be interfered with in that process by having to divert our attention to the production of documents they call for. After we have taken some depositions and know really, on the basis of discussing openly, what the facts are, then we can consider what it is that TWA really needs for the purpose of prosecuting this action.

Before I close, I would like to introduce—perhaps I should have done this before I presented my argument—Mr. Raymond A. Cook of the Houston firm of Andrews, Kurth, Campbell & Jones who is here with me, and I would like to move his admission for the purpose of this case.

The Court: We are very glad to have you here.

Mr. Sonnett: I am happy to have the frank concession, your Honor, that Hughes controls TWA "and so what" because that concession saved us a lot of waste motion in proving what I think is pretty obvious anyway.

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The fact is that he did control TWA up until December of 1960. The fact is that aside from [19] Tillinghast, the new president of TWA, the people of TWA whose depositions he wants to take are people who were working for TWA at a time when every significant decision of TWA was imposed on it by Hughes and people who reported directly or indirectly to Hughes.

The pose that they are completely in the dark is absurd on its face. They dominated, controlled and ran this airline and ran it into the ground prior to December of 1960, so much so that when, in order to raise funds to buy jets which were vital to its existence, TWA could not get the money except from Hughes primarily or from the banks and lending institutions, the banks and lending institutions said they wouldn't put up the \$167,000,000, I think, of their money and their depositors' money and their policyholders' money until there was a voting trust which would take control of this airline away from the man who had ruined the airline, to wit, Howard Hughes.

The voting trust was signed with the authority of Hughes. He accepted, in December of 1960, the hard fact that under his control the airline was about to go into bankruptcy. So he accepted the voting trust.

[20] There were three voting trustees appointed, all distinguished men: One, a defendant here, a Hughes Tool man named Holliday; another, Ernest R. Breech, former chairman of the Ford Motor Company; the third, Irving M. Olds, former chairman of U. S. Steel.

The voting trust agreement is a long, carefully drawn, carefully worked out document which was examined, cross-examined and looked at over a microscope by Hughes' counsel, and on the eve of the airline going under, in De-

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cember, 1960, he finally, at the eleventh hour, signed or caused the signing of the voting trust agreement.

The voting trustees put in a new board of directors. I am not going to dwell on the board except to note with regret in one sense that one of its distinguished members, John McCone, former chairman of the Atomic Energy Commission, has just been appointed as head of the Central Intelligence Agency. That is the caliber of the new board. This isn't a board that has been running this thing out of some back room in Beverly Hills, like Hughes was running it. This is a responsible board of directors of excellent businessmen. That board picked a new [21] president who has been trying to run the airline.

The airline was pretty sick, indeed, in December of 1960, and it has gone through a very, very difficult economic period, as have all airlines, but this one was very sick to begin with in December of 1960. And, as Hughes Tool Company has recently been informed, the financial situation confronting this airline is very perilous today. A new program was announced for the procurement of Caravelle planes. It looks as though that program will have to be called off. The airline is still suffering from the strangulation that Hughes has imposed on it in the exercise of his control, keeping it so weak in terms of equity that it couldn't stand on its own feet without his helping hand, indeed, the helping hand that took it and led it and forced it to go where he wanted it to go.

Your Honor, we have made our position quite clear in the complaint. We have also spelled it out, I think, very lucidly in our brief with respect to their claimed defenses. Now I urge your Honor, in the interest of keeping the airline going and in the interest of the minority stock-

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holders, to take action which will make it possible to try this case as early [22] as possible because I think what is motivating them is that, if they can avoid an early trial, they may be able to avoid any trial at all. I think that is what they are up to.

The Court: Everybody seems to want an early trial. Everybody wants depositions and papers and documents. We can try it tomorrow, you know, if you want to.

Mr. Sonnett: May I suggest to your Honor that, if counsel is agreeable, I am prepared to go ahead.

Are you agreeable, counsel?

Mr. Davis: Certainly. To start trial in this case?

Mr. Sonnett: Yes.

Mr. Davis: Certainly. Bring Mr. Tillinghast in.

Mr. Sonnett: If your Honor will fix a date, we will start the trial any date suitable to your Honor.

The Court: He said "Bring Mr. Tillinghast in."

What did you mean by that?

Mr. Davis: Mr. Tillinghast is the person whose deposition we have been trying to take for some [23] time, your Honor. Currently he is the president of TWA. As your Honor knows, an answer has not yet been put in—

The Court: We have pending two motions, too, which you held in abeyance for summary judgment to dismiss the complaint.

Mr. Davis: That's right, your Honor. That is what I adverted to a moment ago. As your Honor will recall, the last time, which was the first time we appeared, the question of this motion to dismiss came up. We believe that this case can be decided, in so far as the complaint is concerned, on admitted facts. However, and we are prepared to proceed with that motion to dismiss, in all candor I

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must say that when I see what the answering affidavits are, and I presuppose that Mr. Sonnett will serve us with answering affidavits which will raise issues of fact, if that takes place, then we will be able to decide whether or not we are ready to proceed with a motion to dismiss and summary judgment.

The thing which Mr. Sonnett overlooks, of course, is the counterclaims we have. If we are going to stay in this court, we have some very serious [24] problems relating to TWA and the persons who acquired control of TWA.

Mr. Sonnett referred very briefly to what took place in December, 1960 on this financing and creation of the voting trust. I don't feel I should go into that until I am prepared to submit the facts formally, but it is a real serious problem. There is a very serious problem involved in connection with this very recent financing that Mr. Sonnett referred to, because we have a situation here where the lending institutions, whether they like it or not, acquired control of TWA. They acquired complete control of the voting trustees who, in turn, completely control the board of directors.

We have no objection to the board of directors, your Honor, but those same lending institutions very recently negotiated with TWA, whom they control, and therefore I call that self-dealing, a new debt arrangement for an additional \$147,000,000. That is in addition to the \$167,000,000 or \$165,000,000 that was arranged in 1960 which produced this voting trust. If you look at the provisions as quoted in the affidavit of Mr. Holliday, the lending institutions, who were in control, who were dealing with themselves, [25] put in some provisions obviously designed to perpetuate or continue their control of TWA.

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Your Honor, there is something very peculiar there. They imposed a 22 per cent penalty on the Hughes Tool Company if the Tool Company pays them off. I don't know why. They provided in this new financing that the new \$147,000,000 long term debt accelerates or matures all at once if this voting trust should terminate, lawfully terminate, or if Mr. Hughes should acquire all these outstanding notes.

I don't know what power these lending institutions think they have to impose those kind of terms on a business whether or not it is in need of funds.

In the allegation of this complaint of antitrust violation there is a little bit of: if I do it first maybe I will stop them from doing it to me. But, if there has been anybody who has been capturing the market for financing the whole phase, it isn't the Hughes Tool Company. The Hughes Tool Company has no objection to other people financing it, and the record is perfectly clear when you look at what has happened to it throughout the years. It isn't the Tool Company who is insisting on [26] financing TWA. It appears at the moment that the persons who have acquired control of TWA would like to keep that control.

Mr. Tillinghast, as the president, makes a contract, negotiates with someone, I don't know who, which contains provisions as to the annuity he is to receive should the voting trust terminate.

We own 78 per cent of the stock, yet we have no right to vote a single share of it, and there is a management who is not responsible to anybody. The lending institutions say: We have elected a fine board and we want to wash our hands of it. All we want to do is deal with new owners. That is all we want to do.

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The management of TWA that is in there now has no ownership responsibility, has no responsibility to ownership whatever. It is a very interesting situation, and all of it will be brought out when we file our answer and counterclaims.

It is well known and appreciated by TWA and by some of the people of TWA that Hughes Tool Company is not one that seeks lawsuits, and the first question before us is to delineate the issues underlying the complaint, and the way to do that, your [27] Honor, is either to require them to submit affidavits setting forth the facts which they claim exist or give us an opportunity to take depositions so we can find out what the facts are. Somebody made a decision to file this complaint. Somebody must know what the facts are that they are complaining of, and that is the plaintiff, and there is nothing unusual about that.

What we want to do is to proceed with the taking of depositions of the plaintiff, and we have argued this question twice now, your Honor, both before Judge Murphy and before Judge Herlands, and this is the third time it is coming up.

The Court: One thing that bothers me, Mr. Davis, on this motion, and I haven't read the briefs, obviously, is this: Isn't the plaintiff entitled to these documents, without the substantive questions of the tax return and the financial statements, to adequately prepare for your deposition?

Mr. Davis: I assume they will have ample opportunity to prepare for the taking of depositions of the Tool Company. All I am saying is that—

The Court: No. To prepare for the [28] depositions that you are going to take of TWA. They are going to

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have a right to cross-examine those witnesses, and those documents may be important.

Mr. Davis: I assume that TWA, the plaintiff, is fully prepared to answer questions with respect to the complaint. I take it that all the documents they need as to the facts that they claim are relevant to this issue were considered before the complaint was filed.

The Court: Well, there may be a lot of other documents in existence which they have heard of or think exist but which they never saw, and that happens in all these cases.

Mr. Davis: Let me point out that that is true in every case, and I respectfully submit, your Honor, that somebody has to start, and once somebody—

The Court: The only question I have here is whether they are entitled to the production of documents from you before you start the oral depositions of the witnesses on your motion against them. That is the only question I have.

Mr. Davis: You mean in taking the deposition of the plaintiff?

The Court: That is the only question I [29] seem to have. If I am mistaken, I would like to be told where.

Mr. Davis: If we eliminate the question of the financial statements and the tax returns—

The Court: No, you cannot eliminate that. That is something I still have to determine. I haven't said whether I will allow them or not. But, whatever documents they are entitled to, isn't the question whether they should have them before you start taking your oral depositions?

Mr. Davis: Your Honor, that is what I meant to suggest in my other presentation. In so far as the time in which we are supposed to produce documents to help them

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to cross-examine whatever witnesses they want, may I suggest that is a matter which can be decided after we have completed taking the depositions of the plaintiff. At that time I think we may be in a position to know whether or not we are going to proceed by summary judgment or not.

I would be very frank to say, your Honor, that after we have taken the deposition of the plaintiff and before we start taking the deposition of witnesses, if your Honor feels that the plaintiff needs documents that we have, even though they have [30] described them by saying "Give us whatever we have asked of you," which is all right with me, we will take the time off and produce those documents.

The Court: Mr. Sonnett?

Mr. Sonnett: May it please the Court, on the question of the trial date which I think strikes at the heart—

The Court: We have passed that facetious remark.

Mr. Sonnett: I think your Honor put his finger on what the heart of the problem is. May I say that unless this case is set for trial and goes to trial early in the year, I think there are grave questions as to whether there will be any trial at all. I am prepared to submit, your Honor, if counsel is agreeable, a statement off the record which will emphasize the imperative need for an early trial, and I assert to your Honor it is imperative. So that I would apply to your Honor now to fix January 2nd as the date for trial of this case—

The Court: That is the date I fixed in the minority stockholders suit against duPont. I know they are not going to meet it, but—

Mr. Sonnett: We can meet it, provided [31] your Honor imposes the control—

The Court: In fact, I made it January 2nd of last year and they didn't meet it.

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Mr. Sonnett: We will meet it in this one because we will be forced to meet it, your Honor. We will be forced to because we have no choice. With the strong hand of the Court on the pretrial, we can be ready, all of us.

He talks about wanting depositions. Fine. I would like to make one thing very clear. As counsel for TWA, I haven't any concern, really, about what he does or doesn't do in his problems with the banks and the insurance companies. If he is able to demonstrate that the obligations of these banks to their depositors and the obligations of the insurance companies to their policyholders were not the reason why the banks and the insurance companies insisted on the voting trust, as apparently they did, if he is able to persuade the Court that maybe even the CAB in its December order, when they said they would approve the voting trust but they want to make it clear that there would have to be a searching inquiry before they will ever let Hughes get control of this airline, searching in terms of the public interest—[32] if all of that is to be disregarded and Hughes is going to be able to tie this case up, in what is a diversion, in some collateral problem he may have, then I say to your Honor that there may not be anything left of this case except perhaps in the extreme case of it being advanced by a trustee in bankruptcy against Hughes.

Hughes is notorious for delay. He delayed all during 1960 in stepping up to the plate on financing, and TWA was hurt and hurt badly, as the CAB noted in its December order. This is not just my assertion. This is an assertion by the Civil Aeronautics Board based on what it knew about what Hughes had done here.

I say to your Honor that there is a pressing need, in the interest of the airline with which I am concerned, to

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go forward with the case, and whatever problems Hughes may have with the banks and insurance companies are their problems; they are not TWA's.

Counsel can hardly be serious in saying that the corporation, of which Hughes has the beneficial interest of over 78 per cent, was doing something—the corporation, which is the plaintiff here—which would warrant any counterclaim by him against the corporation. The only thing the corporation did [33] that hasn't pleased him is that it filed this lawsuit, and we intend, if we can, to see that it is tried.

I don't think there is any way of bringing this case to a head and of preventing the kind of stalling tactics that will occur that may make the lawsuit moot unless your Honor imposes a very strong hand on the pretrial, and the only way I think that that can be effectively done is to set a trial date, and then we are all going to have to meet it. And the depositions are not going to go on for weeks or months. They are going to be taken in a business-like way and done, and they will be done much more quickly if we have the documents in advance.

That is all I have.

The Court: Mr. Davis, do you want to say something?

Mr. Davis: I don't think it is necessary for me to say anything more than I have already said. I gather Mr. Sonnett is not asking the Court to put in an anticipatory limitation on a deposition which has not yet commenced. I think we can dispose of whatever problems occur in the so-called firmly-handled depositions after they have started or after [34] we see what kind of information we get.

The Court: I have an expression of opinion from both counsel that you are anxious for an early trial. Conse-

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quently the Court will be guided by that in either case. But I am not prepared to fix a trial date now, Mr. Sonnett, because I am not sure of my own schedule. I know I have a private antitrust suit starting on December 6th. Whether I can then engage in another long trial depends on the Chief Judge of the Court, as to whether he wants me to give up my regular assignment through January and February to take this on. I am perfectly willing to do so. Whether I try this or some other case makes no difference to me. But that is a question of administration.

All right.

Pretrial Order, December 18, 1961

[Doc. 354]

[CAPTION]

61 Civ. 2324

ORDER

Plaintiff having brought on a motion, pursuant to Rule 34, Federal Rules of Civil Procedure, for the production and inspection of documents and argument having been had thereon on October 2, 1961, and plaintiff having appeared in support of said motion by CAHILL, GORDON, REINDEL & OHL, Esqs. (John F. Sonnett, Esq. and Paul W. Williams, Esq., of counsel). and defendant Hughes Tool Company having appeared in opposition thereto by CHESTER C. DAVIS, Esq., Paul, Weiss, Rifkind, Wharton & Garrison, Esqs. (Jay H. Topkis, Esq., of counsel) and Andrews, Kurth, Campbell & Jones, Esqs. (Raymond A. Cook, Esq., of counsel), and due deliberation having been had thereon, and the court having rendered its decision in a Memorandum Opinion dated December 5, 1961, it is hereby

ORDERED, that:

1. Plaintiff's Motion for an Order, pursuant to Rule 34 of the Federal Rules of Civil Procedure, directing the production and permitting the inspection and copying of documents, papers, books, letters and other material in the possession, custody and/or control of defendant Hughes Tool Company as designated in the schedule annexed to said Motion, is granted.

2. The depositions heretofore scheduled by defendant Hughes Tool Company under its notices are hereby

Pretrial Order, December 18, 1961

rescheduled to commence on January 5, 1962 in the order and sequence noticed and the depositions heretofore scheduled by plaintiff under its notices are hereby rescheduled to commence on April 3, 1962 in the order and sequence noticed.

3. The production of writings and other material by defendant Hughes Tool Company pursuant to this order shall be made on March 15, 1962.

4. Pursuant to the provisions of Rule 30(b) of the Federal Rules of Civil Procedure, all income tax returns and financial statements of defendant Hughes Tool Company produced pursuant to this Order for inspection and copying shall not, without further order of this court, be disclosed publicly by plaintiff or its counsel except in connection with the preparation, pretrial proceedings and trial of this action or any other action or proceeding in which any of the parties herein are participants.

Dated: New York, N. Y.
December 18, 1961

/s/ CHARLES M. METZNER
U.S.D.J.

Toolco's Notice of Motion, February 15, 1962

[Doc. 66]

[CAPTION]

61 Civ. 2324

**NOTICE OF MOTION
BEFORE THE SPECIAL MASTER**

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Chester C. Davis, sworn to the 15th day of February, 1962, defendant Hughes Tool Company will move before J. Lee Rankin, Esq., the Special Master herein, (1) for a ruling that, pursuant to Rule 26, Fed. R. Civ. P., the deposition of plaintiff, Trans World Airlines, Inc., be concluded prior to the commencement of any other depositions noticed by Toolco or by any other party and (2) that the Special Master determine whether the deposition of plaintiff be suspended until a reasonable time has elapsed for the service of the additional defendants and for their appearance in the discovery proceedings.

Dated: New York, N. Y.

February 15, 1962.

Yours, etc.,

CHESTER C. DAVIS, Esq.
*Attorney for Defendant
Hughes Tool Company*
120 Broadway
New York 5, N. Y.

[To Defendants' Attorneys]

[fol. 1024]

[File endorsement omitted]

[fol. 1025]

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
61 Civ. 2324**

TRANS WORLD AIRLINES, INC., Plaintiff,

VS.

**HOWARD R. HUGHES, HUGHES TOOL CO. and
RAYMOND M. HOLLIDAY, Defendants.**

Transcript of Proceedings—New York, February 23, 1962

Before: Hon. Charles M. Metzner, District Judge.

APPEARANCES:

**Cahill, Gordon, Reindel & Ohl, Esqs., Attorneys for
Plaintiff; John F. Sonnett, Esq., Dudley B. Tenney, Esq.,
and Marshall Cox, Esq., of Counsel.**

**Chester C. Davis, Esq., Attorney for Defendant Hughes
Tool Co., Chester C. Davis, Esq., and Maxwell E. Cox, Esq.,
of Counsel.**

**Cravath, Swaine & Moore, Esqs., Bruce Bromley, Esq.,
[fol. 1026] and Winthrop, Stimson, Putnam & Roberts,**

Transcript of Pretrial Hearing, February 23, 1962

Esqs., Peter W. Kaminer, Esq., and Silas M. R. Giddings, Esq., and Ben-Fleming Sessel, Esq., and Chadbourne, Parke, Whiteside & Wolff, Esqs., Edward Neaher, Esq., and Dunnington, Bartholow & Miller, Esqs., Charles L. Stewart, Esq., of Counsel, Attorneys for Additional Defendants.

**ARGUMENT ON SCHEDULE OF DEPOSITIONS
RE ADDITIONAL DEFENDANTS**

Mr. Bromley: May it please the Court, my name is Bruce Bromley. My firm is Cravath, Swaine & Moore. We represent four of the nine additional defendants which about ten days ago were brought into this action by way of the assertion of alleged counterclaims.

Four of the nine additional defendants represented by me are Metropolitan Life Insurance Company, the Equitable Life Assurance Society of the United States, James F. Oates, Jr., the president of Equitable, and Harry C. Hagerty, the vice-chairman and board of directors of Metropolitan.

There is before you, brought on by notice, a motion on our part which is by way of an appeal from a ruling or [fol. 1027] rulings of the Special Master. The motion seeks an order and direction from your Honor that the schedule of depositions which your Honor set by order of February 7th be revised and that the additional defendants be granted priority of discovery after the defendant Tool Co. shall have completed its discovery of TWA, and to that extent the schedule be interrupted so we additional defendants can discover the basis of the counterclaims after Tool Co. shall have discovered the basis for the complaint against it, and then, and not till then, shall the rest of the discovery by way of deposition go forward.

On February 13th, which was just a week after your Honor set the schedule in the main action, Tool Co. served upon us a 62-page alleged counterclaim and answer.

In that document six so-called counterclaims were pleaded, and nine additional defendants were added to the action. As I say, this was just a week after you had set up the schedule in the main action.

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Five of those counterclaims concerned the additional defendants. Only one of them is a real counterclaim against [fol. 1028] TWA, and that is the sixth one for unpaid interest, so alleged.

But the other five claims are really independent claims, and TWA is joined merely, I submit, as a device in order to label these claims as counterclaims, because no relief is sought against TWA of any substantial nature, although the claims demand against the additional defendants more than half a billion dollars in damages, in addition to certain injunctions.

Within hours after these counterclaims were filed, Tool Co. through Mr. Davis, Hughes Tool Company, instituted efforts before the Special Master to subject all these additional defendants and the counterclaims to the three established schedule of depositions which your Honor had set up before any of these claims against the additional defendants had been asserted.

I say to your Honor at the outset your schedule obviously was set up in an entirely different lawsuit than the one which now confronts us and is before you. In spite of our best efforts with the Special Master he has refused to grant us what we believe to be adequate relief, and he has ruled [fol. 1029] that before any of us additional defendants can have any discovery of any kind by way of depositions from Tool Co. relating to the counterclaims Tool Co. may examine not only TWA as to the basis of its complaint against Tool Co., but also examine in aid of Tool Company's defenses to that complaint, examine all other witnesses and parties, and also may examine the additional defendants.

He has also indicated that Tool Co. may examine not only as to the basis of the plaintiff's claim against Tool Co., but also the additional defendants on the counterclaims.

That ruling, we submit, is wrong because it denies the additional defendants seasonable opportunity to develop from Tool Co. the person asserting the counterclaims against the defendants the basis of those claims, the real issues, and denies us the opportunity to define and delimit them in seasonable time so that we may, if we are so ad-

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vised and the basis appears; move to dismiss some or all of them.

The ruling denies us that seasonable opportunity so to protect ourselves because many, so many of the facts which are relevant to the complaint and the defenses thereto, [fol. 1030] are equally relevant to the claims made against the additional defendants.

Had these so-called counterclaims been asserted against the nine additional defendants in a separate action, as they should have been, these defendants would, of course, have been accorded priority of discovery as to their basis in just the same manner that you accorded Mr. Davis, and his defendant client, Tool Co., priority.

The Court: Judge Herlands did that; I didn't.

Mr. Bromley: I am sorry, you are correct. Just as Judge Herlands did.

The Court: He gave them priority. I didn't give them priority.

Mr. Bromley: They got that priority.

The Court: They have it.

Mr. Bromley: They got it, and Mr. Davis asserts that is proper action, and normal procedure is always to give the defendant priority, except in this situation.

But Tool Co. has now become a plaintiff against us additional defendants, and I think the law in conventional counterclaim situations is clear that while the defendant [fol. 1031] in an action can have a limited priority to discover the basis of the claims against him, the next proper step is also for the plaintiff, who becomes a defendant on the counterclaims, to have the next priority with respect to those counterclaims. That is what has been denied us, because the Special Master, looking at your schedule, the names, the dates, has embarked upon a program which may take months, perhaps years, to complete that schedule, because it is completely broken apart.

We now have nearly two thousand pages of one TWA witness alone, and although under your schedule we are all due to be in California on the 20th to take the deposition of a witness, one Thomas—

The Court: Didn't he agree to come to New York? I suggested that he be brought to New York at the time I had the prior conference.

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Mr. Sonnett: He did, your Honor, subject to certain mechanical arrangements about transportation, and so on.

The Court: All right.

Mr. Sonnett: As the record stands, I think that he is prepared to come to New York, and so is the Bank of [fol. 1032] America, provided they have arrangements made for their transportation expenses and counsel fees and reasonable notice.

The Court: Thank you, Mr. Sonnett.

Mr. Bromley: My only point is I don't care where the deposition is taken, the fact is the schedule has been completely disrupted because the Special Master says, "The dates don't mean anything; I am going to accord Tool Co. full and complete opportunity without regard to the dates that you set to exhaust its discovery against TWA."

It looks to me, although Mr. Davis refuses to make any estimate, that having really only scratched the surface on one witness that before he comes to the end of the trail on all the TWA witnesses alone it will be months away.

Now, if they are after, he can go down this whole schedule while we sit back unable to find out under proper discovery procedure what the issues between us on the counter-claims really are, and what the basis of those claims are. It is impossible for us to follow this schedule and adequately protect our clients.

I submit that it is of the greatest importance that we [fol. 1033] learn as soon as possible, without interference with his right of discovery against the plaintiff, the basis, the limitations, and the facts underlying his claim against us, and when that shall have been done it is then time enough for both of us to complete discovery with everybody else.

I want to make it perfectly clear that I have no quarrel with Tool Co., Mr. Davis', right to discover against TWA's complaint and to examine all of the witnesses. I wish the Special Master would make him get down to work and do it a little more promptly, but I have no desire to interfere with that. All I wanted to do is to take my place next in line so that I can start somewhere near even with him when we come to proceed to the host of other witnesses who will follow.

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I must say that what Mr. Davis has done appears to me to be a very clever device indeed having gotten you to sign an order giving him complete priority in an action, and having that order signed, sealed and delivered, he then serves this massive claim against nine additional parties, and insists that the schedule which your Honor set—and he has persuaded the Master to follow it—be adhered to [fol. 1034] without regard to the rights of the additional parties to exercise their traditional and normal right of discovery as soon as it is practicable. And surely it is practicable for us to exercise that right of discovery as soon as he shall have developed all of the basis of the three causes of action asserted against him in the TWA complaint.

So, I say that the ruling of the Special Master is an abuse of discretion because of the great prejudice to the additional defendants involved in his decision.

I would like to take just a moment further more to point out, because I think it bears on this, what I said at the outset. That these five claims against the additional defendants are dressed up as counterclaims when they are not counterclaims at all, and obviously done to enable Mr. Davis to hang on to the priority order which Judge Berlands gave him, and to the schedule which your Honor gave him.

I want to take just a minute to look at the second counterclaim. It asserts on behalf of defendant Tool Co. the claim that additional defendants Equitable and Metropolitan have acquired control of TWA in violation of the Federal Aviation Act. But it seeks no relief against TWA. All it seeks is that my defendants be ordered to terminate the voting trust which exists under the financing of all the Tool Co. stock in TWA deposited in that voting trust.

Now, sure, in words the counterclaim says, "We ask the Court to order the TWA recognize any court order which may terminate the voting trust."

Surely, no one in his right mind would say that you need a court order to TWA to cause it to obey another court order. That is a transparent device to make it appear as though this was a counterclaim.

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That goes right down through the whole list. In the next counterclaim, where they seek to recover \$135 million against the additional defendants, they don't ask any damages against TWA, they don't ask any relief against TWA, except that if the Court orders the termination of the voting trust once more TWA shall recognize that order.

Now, why do I mention that? I think we ought to move to dismiss all these counterclaims, except the sixth one, which is a real counterclaim. I hope TWA will do so, and [fol. 1036] in our notice of motion we say we intend to at a day to be fixed by your Honor. But the importance of it today is that here they have a wide open opportunity to develop all the facts that they want to with respect to their claims while we must sit back in ignorance of that information which the rules are designed to accord us by way of discovery of claims asserted against us, or any other person who is in the posture of a defendant. I say that is wrong, and I say that is an abuse of discretion.

I would like to illustrate again, if I can, just how we will be prejudiced with a precise example about Mr. Thomas, of whom we have spoken.

Mr. Thomas used to be the president of TWA. He left in July, 1960. It is alleged in the counterclaim that the additional defendants procured Mr. Thomas' resignation as part of a conspiracy to enable them to insist upon a voting trust of the Hughes stock in TWA. My position is that my clients had nothing to do with procuring the resignation of Thomas, and I believe that it in fact was forced by Hughes, who after a long and bitter negotiation with Thomas booted him out of TWA. But if I have to go ahead [fol. 1037] with Thomas, either in California or in New York, when his term comes under your Honor's schedule, I have got to do that without having had any discovery as to what the Hughes claim is with respect to the charge which involves Thomas asserted in the counterclaims.

I apprehend that lacking that discovery if I get it much later on I shall have to request, move, that Thomas be produced again.

The Court: I would think that is what is going to happen, Judge Bromley.

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Mr. Bromley: Yes. Now, what a waste of time, effort and money that is.

The Court: What do your friends on your left say?

Mr. Sonnett: I would like to be heard, your Honor.

When the additional—

The Court: We assume you will be heard, Mr. Sonnett. I am sorry, I just wanted to tell Judge Bromley something which I am sure he knows, that you have been at the bit since last July, eight months ago, to start, and now he has come in and wants you to wait some more. I assume he understands the effect of his request.

[fol. 1038] Mr. Sonnett: Well, I will have partial opposition to his motion to present in due course, your Honor.

Mr. Bromley: You remind me of defendants in a negligence case. The plaintiff can just sit still, you know.

I only want a little interruption. I don't want to disrupt his plan. I agree he ought to be able to go ahead just as fast as he can, but I do not see how anybody can possibly object to all of us, who have had very little connection with this litigation, being given an opportunity to discover on what basis in the world we are sought to be held liable for half a billion dollars before we undertake to cross-examine, before we undertake the task of posing proper objections, to this vast parade of witnesses. That strikes me as being very fair, and I don't believe Mr. Sonnett will really oppose that once he understands the limited nature of my request.

That confusion to which you spoke, in answer to my suggestion, will follow every witness if this piecemeal approach is permitted.

I mean by that to say that if we have no discovery of the [fol. 1039] claims against us, and Mr. Davis goes ahead on the counterclaims with everybody else, then Mr. Thomas is only one of a large number who we will have to come back and examine again, and I submit that that is a waste of the judicial processes of this Court, and an undue burden on the defendants, and an unnecessary expense.

We were just served with a memorandum from Mr. Davis, and I want to call your Honor's attention to one statement in it, because I think it supports my assertion

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that he has done all this with malice aforethought and with a cleverly designed purpose, and so far as the Special Master is concerned he seems to be getting away with it.

On page 15 of his answering memorandum he says:

"Cases which hold that absent special circumstances priority of discovery shall be based upon who first serves a notice of deposition express a general rule, but in the instant case Tool Co. served its notice to take the depositions of the additional defendants as witnesses many months ago."

[fol. 1040] I think that discloses what he is up to. Before we were concerned with the litigation, or had any standing in it, he served notices to take our depositions. Then when we come into it as additional defendants he says, "Ah, I have priority because, indeed, I served you with a notice many months ago."

I think that discloses his scheme, and I think he should be stopped in order to accord us what the law so frequently and so clearly says the normal rule is, to enable the defendant, as soon as possible, to discover the basis of the claims against him.

As I understand it, Mr. Kaminer from Winthrop & Stimson is here for Irving Trust Company, and Mr. Sessel, and desires to add something with respect to his position.

The Court: Mr. Kaminer.

Mr. Kaminer: Thank you very much, your Honor.

May it please your Honor, I represent temporarily the Irving Trust Company, together with Mr. Sessel and Mr. Giddings.

I say "temporarily" because we were just served and I was the only partner who had a few days available.

[fol. 1041] I was not present at any of the hearings before the Special Master. We were served very recently with this half a billion dollar counterclaim. I want to say if I should make any mistake about facts it isn't intentional. This is all I have been able to learn in the three days that I have had since I got Judge Bromley's motion.

I want to ask for the same relief that Judge Bromley does. I have not even formerly appeared herein, but I have

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with me a notice of appearance, I have with me a paper which I ask your Honor's leave to serve, and that is a paper requesting exactly the same kind of relief that Judge Bromley does, and adopting his memorandum as mine. In other words, there is nothing new in the paper which Mr. Davis has not seen, just so that I have formal standing here to be before your Honor, and also a notice to take the deposition which Judge Bromley has already served.

I don't want to take the time now to interrupt your Honor while I serve these papers. If your Honor prefers—

The Court: You may go ahead.

[fol. 1042] Mr. Kaminer: I want your Honor to consider the situation my clients are in, and their counsel. It is true that your Honor made an order setting forth in what order certain witnesses should be examined and certain depositions taken, but that order was made at a time when we were not sued. We had no standing to be heard, we were not here, we could not have been.

Now, then, the next thing we get is this enormous counterclaim, and I only want to say this. I have spent a lot of time reading it. These are several counterclaims. The sixth one is the only counterclaim which can be said to be one in truth and in fact, and that is only asserted against TWA. Everything else either the relief sought is in favor of TWA, or TWA is brought in by some stringpulling.

Now, we will have time, and we will make a motion, as Judge Bromley pointed out, to say that these counterclaims should be dismissed, and that is the first thing we need time for. They should be dismissed because no matter how liberal the rules are upon analysis it will be seen that they had nothing whatever to do with the complaint and the counterclaims.

[fol. 1043] I can tell it to you in one sentence. The claim says—I am very new to this, so if I make mistakes forgive me—the claim says under the domination, stewardship, whatever you want to call it, of Mr. Howard Hughes and the Tool Company TWA was hurt by a violation of various laws. The counterclaim says under the domination, under the subsequent domination and control or stewardship of their lending institutions TWA and Tool Company were hurt some more.

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That is a different story. It is no answer to the complaint to say later on some other people hurt you.

Now, imagine what kind of morass we are getting into. I am a great believer of consolidation for trial in all kinds of things, but there is nothing here to be consolidated. There are two separate and distinct claims. The Special Master, as I have read in the record, has said this.

It may be there should be priority with respect to the claim of the complaint, and then maybe there should be priority to the additional defendants. He immediately recognized—and he is a very distinguished man and saw that [fol. 1044] clearly—that there will be an area where no one knows where those different priorities well lie because of arguments of counsel which will go on for ages. This will not expedite this case. This will all result in a morass.

Therefore, I say to your Honor that in accordance with the request of Judge Bromley, in which I fully join in every particular and without any exceptions, we be accorded the traditional right to examine first, that that should be granted, and we should also be given time, and your Honor should fix the time, when papers should be served and you will hear a motion to dismiss these counterclaims subject to their being brought in a separate action.

I think there are a lot of games being played here. I am all new to this, and I am just reading papers, as I did all day yesterday. I think the game is that Mr. Hughes doesn't like to be examined, and that is why we have all these very devious schemes of serving notice for examination of witnesses, getting an order setting forth a schedule, and then all of a sudden these witnesses become defendants in a half million-dollar suit.

The Court: Half a billion-dollar.

[fol. 1045] Mr. Kaminer: Your Honor is so right. Thank you.

The Court: I am impressed, Mr. Kaminer. I have got to admit that.

Mr. Kaminer: I am scared, your Honor. These figures are a little more than I am used to.

In addition to that, while there is a partner of mine who is not in the city and has not been since the counterclaim

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was served who knows something about these facts, certain aspects of it, he has never been in court on this.

There is supposed to be production of documents in four places simultaneously. We have got to find out from our clients, we people who have not been to court before, what the facts are. We have got to prepare and elicit those facts and the basis of the counterclaim first from the one asserting it—i.e., the nominal defendant, really the plaintiff. So, I say to you I am not here appealing from the Special Master's ruling because I asked him for no relief. I am applying to you to modify your own order in view of these new developments, because the Special Master is bound by your order. I believe what he did he did because he [fol. 1046] thought your order compelled him to.

Your Honor had set down the schedule, and he thought that he should not deviate therefrom. That is my view, but I don't know the background.

I think your Honor ought to immediately consider, without interruption of the examination of TWA with which we are really not terribly concerned, modifying the priority question and setting down a time when we in any event should argue the dismissal motion, which will be brought.

Your Honor also ought to, I believe, consider that we are not dealing just as far as this priority question is concerned with sporting rules of the game. As far as we in my firm are concerned we have to find out what this is about. We do not know what this is about, and the rights of our clients are very much at stake.

We get a notice from Mr. Davis—that is, our clients did—and we didn't appear then so he couldn't send it to us, so I am not criticising him—that these depositions are going on, and are going to go on according to this schedule. I have never been in a lawsuit, and I doubt whether your Honor has while your Honor was still in practice, where [fol. 1047] within a few days you find yourself expected to examine, cross-examine, where all the others have had months to know all the documents involved. It is just an impossibility.

I am not asking for favors as counsel. I am saying my client's rights cannot be protected.

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Thank you very much, your Honor.

The Court: All right.

Mr. Stewart: My name is Charles L. Stewart, of Dunnington, Bartholow & Miller, appearing for Dillon-Reed & Company.

If your Honor please, the field has been pretty well covered by Judge Bromley and Mr. Kaminer, and if I may I would like to follow the same procedure that Mr. Kaminer has suggested and serve my motion later and adopt the brief of Cravath, Swaine & Moore.

Your Honor, we received this case from our clients late Monday afternoon. Prior to that time we had no opportunity to sit down with them, we didn't even know about the case other than what we had read in the newspapers. They handed over a series of papers which proved to be 60 pages of counterclaims seeking damages against Dillon-Reed in the amount of \$400 million. Even though the [fol. 1048] counterclaims may eventually be shown to be completely baseless the issues are complex and they are very involved.

Yesterday I got a copy of the complaint, and although I have not had an opportunity to study it I agree with Mr. Kaminer that we probably should move to dismiss for improper joinder. But we do need time, your Honor, to make these motions addressed to the counterclaims.

Whether or not the joinder is proper we may even have to request your Honor allow us to take the deposition of the Hughes Tool Company before we can serve a reply on this case. In order to understand some of the facts that Hughes Tool Company bases its counterclaims on.

We came into this case, your Honor, some eight months after it had started. We came into it finding our client was scheduled to have its deposition taken two weeks away, on March 8th.

I join Mr. Kaminer and Judge Bromley in saying there is something very peculiar in this business of only six days elapsing between the time of the order and the time that these counterclaims are served. Both counterclaims must have been in the works for months.

The Court: I am surprised they got them out so fast.

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[fol. 1049] I thought they were going to wait until they finished examining your clients. Everybody knew it was coming, Mr. Stewart.

Mr. Stewart: We didn't, this I assure you, your Honor. We did not.

The Court: Go ahead.

Mr. Stewart: I would like to suggest, your Honor, that they should not be allowed by this ruse of getting a schedule of examinations, examining us noticing us as witnesses in this case, knowing that we were going to be aided as party defendants on these counterclaims, to get priority of examination. I suggest to your Honor that that would prejudice our position irreparably.

I realize that counsel can't be in two places at once, and that your Honor having appointed a Special Master in this case may feel that the examination of TWA ought to be continued. If that is the case, your Honor, may I suggest, as did Mr. Kaminer and Judge Bromley, that after that examination is completed that Dillon-Reed have priority of examination of the Hughes Tool Company.

As Mr. Kaminer suggested, there apparently have been a lot of games going on in this proceeding about which [fol. 1050] at this point we know nothing, but it seems very, very strange to me that Howard Hughes, if he is the leading force behind all of these events, can manage to throw up enough of a smokescreen in which he can persuade this Court, or any of the parties here, that he should not be examined. If he has all the facts and all the background I suggest to your Honor that he is the one who can clear up all of this.

I also don't understand how he can come in and say that you can't get an examination of me because I am an eccentric in California, whereas you are just business men in New York City.

If your Honor please, we ask that we be granted additional time to make our motions addressed to the counterclaims, and that your Honor grant us priority in the discovery of the Tool Company.

Thank you.

The Court: Anybody else?

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Mr. Neaheer: My name is Edward Neaheer, of Chadbourne, Parke, Whiteside & Wolff. I appear here as a pinchhitter for my partner Ralph Ray, who was to be here, but unfortunately had a critical illness of a member of his family at [fol. 1051] home and couldn't make it.

I am somewhat under the same difficulty as Mr. Kaminer in that I have had the benefit of a very quick look at the pleadings and the papers served by Judge Bromley.

The Court: Who do you represent?

Mr. Neaheer: I am sorry, I meant to make mention of that. I represent Charles T. Tillinghast, Jr.

I saw enough in these papers, however, to indicate that it would be very advisable for us, on behalf of Mr. Tillinghast, to join in Judge Bromley's motion and adopt his brief, and I therefore request permission to serve a similar motion as Mr. Kaminer requested.

I don't think I can add much, except I don't think Mr. Davis would claim that an order granting priority in the examination of TWA should be construed as an order granting priority as against Mr. Tillinghast in his individual capacity as a defendant named in these counter-claims. It would certainly seem to us that as an individual defendant he ought to have the advice of counsel and an opportunity to study the claims made against him before [fol. 1052] he would be subjected to continued examination not as a representative of TWA but as one personally liable with other defendants for a staggering amount of money.

That is all I have to say, your Honor.

The Court: All right, Mr. Neaheer.

Mr. Sonnett.

Mr. Sonnett: Yes, your Honor.

I said to your Honor earlier that I had a partial opposition to the position expressed by Judge Bromley, and that opposition also, which is only partial, applies to the position expressed by counsel for the other additional defendants.

I might add that I also anticipate that what I have to say will be in total opposition to what Mr. Davis will say to your Honor.

The Court: Why should this day be different than any other one?

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Mr. Sonnett: I will try to, and I will, I believe, be brief, your Honor.

I have served no papers because I, too, thought that it was an informal pretrial conference under the general order, but I do not believe there are any papers I need to submit to make the point which I hope your Honor will [fol. 1053] consider and will grant.

Going back, quite rightly as your Honor did, to the history of the case, June 30th of last year, your Honor will recall that we applied before Judge Murphy for an order allowing us to examine Hughes within the 20 days on the ground of special circumstances. The special circumstances we then apprehended were that unless restrained Hughes would continue the malicious and very harmful efforts that were being made to disrupt a contract between TWA and Boeing for the supply of substantial numbers of planes in order that Hughes could try to succeed in his effort to ram down TWA's throat some 990 Convairs which Hughes was committed to buy to the tune of some \$80 million.

When the captive customer wasn't any longer captive, he decided to subdue it and make it a captive once again, despite the voting trust, despite the independent board of directors, despite the new management, despite the fact that the Boeing contract was signed up and was to be carried out, and despite the technical judgment of TWA's [fol. 1054] technical people that they wanted the Boeing planes.

I might add that the history of the 990 program, as reported widely since, indicates how wise TWA was. It is an abysmal failure.

Now, because we wanted to put a stop to the Hughes efforts to sabotage the Boeing contract we made an application brought on by order to show cause to examine Hughes within the 20 days. By the time we got that argued on August 1st, Hughes had backed off, and he wasn't quite so vigorous with his efforts.

When Hughes realized on August 1st, which is the time we went before Judge Murphy, that he couldn't succeed in sabotaging the Boeing contract, and that his efforts to settle the litigation were not successful, and that it was going to proceed in open court, and the complaint was un-

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run the risk at that stage of further efforts to sabotage the Boeing arrangement. We think that our lawsuit had a very healthy deterrent effect.

The next time we got into a problem of priority of depositions was because in furtherance of the efforts to settle the case, and by arrangement between counsel, we agreed [fol. 1055] on a stipulation which said that we will treat everybody as if they had proceeded in timely fashion under the rules so that the time that will elapse during the settlement talks will not prejudice anybody. And on the basis of that stipulation when the matter came before Judge Herlands ultimately with respect to some of the notices which Hughes Tool Company had served—they had only served some, not all that are on the list—Judge Herlands said, "In view of that stipulation I think I am bound to apply the normal priority rules, and so I am going to let them have priority as to their notices dated August 3rd," which again I say to your Honor are only a part of the notices that he ruled on.

When the matter came to your Honor, your Honor accepted it as it then stood, and quite rightly so, and at that time I, too, accepted it, feeling bound by the orders to which I have referred on the subject of priority.

However, I submit to your Honor—and this is my opposition to the application made by the additional defendants—I submit that as a matter of law and under well-settled law [fol. 1056] in this district, the record before you now establishes certain circumstances which warrant TWA in taking the deposition of Hughes immediately upon completion of the Tillinghast deposition.

Accordingly, our application is to terminate the Tillinghast deposition by Tuesday. In that connection I should point out to your Honor that your Honor's order contemplated about a week for four TWA witnesses. I should further say that that was the period of time initially selected by Hughes Tool Company on the basis of which they got their priorities.

Further, if they had proceeded to examine properly those depositions could have been completed in a week. But what happened was that although Mr. Davis told your Honor in chambers that he couldn't put an answer in, and he

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couldn't make up his mind about these counterclaims until he had at least examined the four TWA people, and therefore your Honor directed that he would not have to put his answer in until he had examined the four TWA people, he suddenly found himself able, suddenly, quickly, out of the blue, to file the answer and so-called counterclaims before the Tillinghast deposition was even halfway through. [fol. 1057] A very skillful tactical move, but hardly in accordance with the representations made to this Court.

Why the rush about filing the counterclaims? Well, it is perfectly simple, I think, what he is up to. The effort here is to create a diversion in TWA's case, to slow that case down to a walk, to strangle, just as he strangled TWA in years past, as we have charged.

And now, by creating a procedural morass he hopes to bog down this case, and bog it down for good.

I am sure meanwhile he hopes he will get some pat on the back from the Civil Aeronautics Board for being willing to put some money into Northeast, and maybe get a white-wash that way. I don't know what he is up to. But I know one thing for sure, and it is obvious from this record, that what he is trying to do is prevent the TWA case from being progressed as it could be speedily and come to trial, as I hope it can.

The Tillinghast deposition, had it been taken on the issues raised by the complaint and the answering portion of the answer, could have been done easily in a day and a half to two days. Tillinghast became president of TWA [fol. 1058] in the spring of 1961. The complaint was filed on June 30, 1961. He has been examined in great detail about everything that happened before he became president up to the time he became president, while he was president, and that about 90 per cent of the deposition has had to do with things that happened after he became president and after the lawsuit was filed, all examination clearly designed to try and find some support for these so-called counterclaims.

So what counsel has done—and I submit this as to TWA, and I am not concerned about the additional defendants, they can take care of themselves—but as to TWA if the answer and counterclaim had been before your Honor when

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you made your last order I believe you would have relied on the decisions in this district that say that when a plaintiff is confronted with a counterclaim this rule about defendant's priority of discovery does not apply because the assertion of the counterclaim against the plaintiff is a special circumstance under the decisions in this district, as I read them.

Therefore, I say as matters stand today on the record [fol. 1059] before your Honor there are special circumstances, and, therefore, I say having had two weeks of Tillinghast when he could have done it in two days, that we should be allowed to proceed with discovery against Hughes Tool Company, and I think that the only practicable solution to the administration of the case is to provide some series or program of alternating depositions along that line.

I would be very happy to have the additional defendants out of this case, and that isn't because I have reached a judgment as to whether there is any merit or not in anything Davis says about the additional defendants. I can say that on the basis of everything I have seen to date I see no basis for the assertion of the so-called counterclaims, certainly not against TWA. They are strictly phonies. The only counterclaim that seeks anything from TWA which might be called a counterclaim truly is the \$170-odd thousand from TWA, and this is on the theory that he is entitled to double interest on some obligation of TWA's.

I am prepared to submit that matter on the papers to your Honor for a ruling, and if he is right we will pay the judgment within 24 hours. That has nothing to do [fol. 1060] with the rest of this mish-mash that he has come up with as a counterclaim. It is purely a question of construction of some documents.

TWA doesn't think he is entitled to the extra \$76,000 in interest. He says he is. But other than that all he is doing is he is saying that since December of 1960, when the voting trust went into effect, this big conspiracy to take control of TWA away from Hughes and give it to the banks and the insurance companies has been in existence. If every word of that were true, if every single word

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of it were true, it would not be a defense to any aspect of TWA's cause of action as alleged in this complaint. It is apples and oranges.

As a matter of fact, he has been kind enough to serve a derivative suit for TWA against these additional defendants so that TWA would get \$115 million from Mr. Davis' client, and if he is right—I doubt that he is, from what I know to date, but if he is right we will get another \$135 million from these additional defendants.

I would not protest TWA getting \$280 million, but I don't want to have my lawsuit for TWA, which is what [fol. 1061] I am concerned with, ground to a halt and brought to a halt by the tactics that he is using. If he wants to sue them, he can sue them in some other case, not in my case.

In any event, if they are going to stay in the case, it seems to me that the whole posture of the case before your Honor has changed, and that your Honor should apply a rule of alternating depositions relying on the decisions in this district so that TWA should start with Hughes next week, when Tillinghast is through. That is, I believe, the only fair construction of the cases on a record like the one before you.

The Court: You say that the rule in this district is that where the defendant has served a counterclaim he loses his priority of deposition in so far as the counterclaims are concerned, and that the plaintiff made them proceed?

Mr. Sonnett: Yes, your Honor. There are decisions—

The Court: I don't know whether I should tell you this, but your firm submitted a brief just the opposite to me the other day.

Mr. Sonnett: Not in a case like this.

[fol. 1062] The Court: Paramount v. De Laurentis.

Mr. Sonnett: I don't know who wrote that brief, but let me say I have read Bromley's brief, and I say—

The Court: I don't know who wrote that brief. I read it yesterday, and I decided it. Maybe you ought to read the Law Journal.

Mr. Sonnett: In this case, it is hard even to read the morning papers.

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On the basis of Bromley's brief you have this transparent attempt to make counterclaims against TWA. I say this is radically different from the other. On the state of this record I believe TWA is entitled to a fair chance for its discovery because the record has been radically changed and changed by action of the Hughes Tool Company alone, and was done at a time months or at least a month ahead of the time they said to you they would be ready to do it, and because Tillinghast has been examined for two weeks when a proper examination should be two days.

The Court: All right.

Mr. Sonnett: I hope I have made myself clear that I do not think that these additional defendants who were charged [fol. 1063] with doing something wrong from December 1960 to date belong in my case where I charge Hughes with violations of law which are very serious from 1939 to June of 1960. It is a case of apples and oranges, and he is slowing us down desperately in our case, which is all I am concerned with.

The Court: What I would like you to do is submit a short memorandum of law on this question of priorities. I am sure you don't want me to rely on the one I read yesterday in another case.

Mr. Sonnett: I am sure that one is not a situation like this.

The Court: I think it is.

Mr. Sonnett: You mean there were additional defendants?

The Court: No, there were not. Not additional defendants.

Mr. Sonnett: This is what I am relying on. If you take them out of this case, the additional defendants, I am prepared to go forward on the order and the schedule that you last signed. I am quite prepared to do that, because then it is the same case, but if they want to sue us for the \$75,000, that's all right.

[fol. 1064] The Court: You will pay them?

Mr. Sonnett: I will pay them if they are entitled to it, and you say so. But while they are in the case—

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The Court: Let me have that memorandum in the next couple of days.

Mr. Sonnett: Yes, your Honor.

The Court: Mr. Davis, you have been sort of quiet. But that is not a word of encouragement. I would like to finish by 12.30.

Mr. Davis: I think I will be finished by 12.30, your Honor.

For the record, my name is Chester C. Davis, and I am appearing on behalf of Hughes Tool Company.

I am really surprised at so many eminent counsel seeming to be so disturbed at a procedure which to me appears relatively simple. On this priority of discovery proceedings I think everyone recognizes that it involves a certain amount of discretion to be applied to the various circumstances presented to the Court. I believe there are decisions in this district which indicate that the Courts need not be slaves to the concept that a defendant normally is [fol. 1065] entitled to priority.

The reason for the development of that concept, as everybody recognizes, is under the new rules at the time the plaintiff forms a complaint and under the new rules of pleading he does not say what he is complaining of, and, therefore, the defendant needs to find out what it is that the complaint is all about, and is normally given priority.

I think this is applicable in this situation, also. Everybody recognizes everybody will have a chance to get all these facts they need before there is any judgment entered on whatever contentions are asserted by anyone. No one is going to be deprived of the fairness of justice. It is a question of getting the facts.

I am not going to rely on the general principle, which I am sure is also recognized by everyone here, that since this Court has delegated the discretion as to how these discovery procedures were to be conducted to a Special Master they should normally be left to interfere with the Special Master unless there is a clear abuse of discretion.

I should like to merely present some of the circumstances [fol. 1066] which are here present, and which to my mind clearly support the ruling and the fairness of the rulings made by the Special Master.

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We have to start with the complaint. A complaint very artfully drawn but as vague and general as one can find, notwithstanding the number of pages which it runs. It doesn't say one single thing as to what it is they're complaining about, except allegedly it is a violation of the anti-trust law. It doesn't refer to the CAB orders. All you can glean from it is that somehow or other the Tool Company, while it was in management, or presumably in control of TWA because of its 78 per cent stock ownership, that it used that control in an improper manner in connection with financing and furnishing of equipment, particularly the jet equipment. That comes out of the complaint and conclusions.

Also, some contentions that the Tool Company in 1961 wilfully and maliciously interfered with the business of TWA. Then some reference that a merger to be approved by CAB and the stockholders constituted some conspiracy in violation of the antitrust law. That is all the complaint says.

[fol. 1067] In that connection, may I also point out that there is no question that the defendants Equitable and Metropolitan and Irving are in control of TWA, were in control of TWA when this complaint was prepared and served on the Tool Company. Whether or not they deny exercising their control is a matter of fact to be established, but there is no question they are in charge of TWA today, assuming the 78 per cent stockholding. These people who sit right here.

Now, the complaint says nothing. An effort was made to obtain the deposition of Mr. Hughes out of turn. Judge Murphy denied that. The stipulation that was decided upon has nothing to do with anything except that the parties agreed to delay everything during the month of July so that when everything was resumed the same rules would apply, et cetera.

The question first came on before Judge Herlands at a time when the Tool Company quite properly based upon a completely vague complaint said:

"We want to find out what it is they are complaining against us, and in order to do that we want to take the

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[fol. 1068] deposition of TWA, the Metropolitan, the Equitable, Tillinghast, the list."

There is no question but we had a right to do that. It was bitterly opposed.

Now, on this scheduling—may I interrupt for one moment to point out Judge Herlands, in the course of the argument, said, "Why don't you gentlemen submit your respective proposed schedules."

These notices of deposition, your Honor, were not served or were not noticed in any particular order based upon the facts or circumstances which we had of knowing the best way to develop these facts and defending ourselves. Instead of following the practice in this district, including the one followed by Mr. Sonnett, of having all depositions returnable the same date and the same place as his were, one in California and one in New York the same day, we indicated we were prepared to take the deposition of one party and a week after the completion of that deposition to commence the next one, as a general scheme of what we were prepared to do. We were the ones who wanted to move expeditiously.

That complaint hurt the Tool Company before the CAB. [fol. 1069] The CAB is investigating the charges of this complaint on an entirely unrelated transaction. We were the ones interested in finding out the facts which supported this complaint.

Mr. Sonnett submitted to Judge Herlands a proposed schedule where he would start with Mr. Hughes, then we would take them on alternating schedules. We submitted a memorandum where we said the only schedule we submit is that we are permitted to take and discover the facts of all the people who we have noticed, and then TWA may discover from us.

Judge Herlands denied to adopt either schedule submitted to him, and the decision clearly stated the defendant was supposed to have priority as then noticed.

This proposition of people not knowing is the surprising thing. Notices and subpoenas duces tecum were served on the Equitable and Metropolitan and Dillon-Reed as of Sep-

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tember. Judge Ryan thought it was going to be a big case, and should be assigned to one judge for all purposes, so Judge Ryan said, "Until I assign it to a judge for all purposes I am going to hold up everything." That stopped us [fol. 1070] from completing the service of subpoenas and it suspended the return date of those notices.

These gentlemen then took the position, legally quite correct, that they did not have to respond to these subpoenas duces tecum until the return date of the notices. Meanwhile, sure, they must have done something to gather the documents. Perhaps not through the particular individual counsel here present. Since last September. But they took the position, which they had a right to, of not giving us anything until the return date of the deposition.

Obviously, the purpose of getting documents is to enable an expeditious deposition, whoever it may be that has to be examined orally. In any event, everybody is in accord that Judge Herlands decided in this case that the Tool Company was to have priority in the depositions which had been noticed, and we have not changed that. We haven't added to it. We haven't added a single individual or party to it. It is the same people.

I do not believe everybody is construing what the Special Master has been doing as something which he feels bound to do not to deviate from the order or the time of the scheduled [fol. 1071] rule which is annexed to your Honor's order. He has construed that order, I think, the way it was intended, and certainly in accordance with what it says—namely, that the Tool Company is to proceed expeditiously and as much as possible maintain a scheduled time and keep going.

The Special Master did indicate at an appropriate time he will undertake a showing of good cause for an alteration of the order of taking those depositions. After all, the responsibility is upon counsel for the Tool Company to develop the facts in its defense.

Now, knowing that the contention of the Tool Company was that these parties had acted together in what we claim to be an improper and unlawful manner to acquire control of TWA, we did put informally those persons on notice that while they were being noticed for their deposition as witnesses to protect themselves because we had in mind the

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possibility that the same facts which constitute a defense to this complaint might very well also constitute the basis for further additional relief.

[fol. 1072] Mr. Kaminer, I believe, is in error when he says that this answer and the counterclaim merely say that TWA has been injured further and more than the alleged injury that TWA is asserting against the Tool Company. That answer, your Honor, sets forth facts in considerable detail which, if true, constitute a defense.

If TWA was deprived of equipment, if the financing of TWA injured TWA, as is claimed in the complaint and we can show that that was the result of the course of conduct, or a conspiracy, or a monopoly, by these other persons, if only on the issue of damages as to did we cause the injury or did they, the same set of facts, plus the addition of the prayer for relief, might very well also constitute a basis for additional relief.

Whether we call it counterclaims, or affirmative defenses, is not particularly important. We have alleged facts in our answer. It is wrong, it is specific. I do not believe that Judge Bromley really means it when he says "We don't know what we are defending against."

I submit, your Honor, that the answer that we have served is about as detailed a pleading as has been filed in [fol. 1073] this court for some time.

Your Honor is fully aware of the fact that counsel for TWA was pressing us for putting in an answer as soon as possible, and your Honor indicated that even though we have a motion to dismiss this complaint pending which has not come into issue for a number of reasons that it seemed the time was approaching when an answer ought to be put in, and I expressed in chambers at that time my concern that these witnesses that had been noticed perhaps should know the nature of the claim that we were asserting.

Had we filed to serve those papers as promptly as we could, I could have understood a sense of unfairness or injustice to require these persons to be deposed to produce these documents which will condemn them and yet be in the dark as to the nature of the claim that the Tool Company intended to assert against them, and derivatively on behalf of TWA, because today there is only one person who is

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really interested in TWA and that is the 78 per cent stockholder. The others don't have any interest in TWA except possibly to maintain the captive market for financing, or [fol. 1074] for something else.

All that has happened is that we have told these same witnesses, the same persons, who have testified to exactly the same thing, that will produce exactly the same documents, we have put them on a formal notice as to what the nature of our contention is. Why that creates any sense of unfairness, injustice, or depriving anybody of any rights I simply do not understand.

Mr. Sonnett said—I presume he is representing TWA and should be interested in this derivative action—he says, “Go ahead, but start it in another action.”

Suppose we had done that on the same facts. We would still be taking the depositions of these parties, obtaining the same documents. Should we move to consolidate for trial afterwards?

They say, “Ah, yes, but had that been done they would have had an opportunity to take the deposition of the Tool Company first.”

I have no question in my mind if that had been the mechanical posture of the case that we would have been before your Honor and said, “Your Honor, obviously we can't be [fol. 1075] in two places at once. We are engaged in taking the deposition pursuant to the action commenced by this complaint. We are pursuing it without delay.”

And they will have to wait their turn. That is all we are talking about.

Now, quite apart from the fact that the answer is quite detailed, as distinguished from the complaint, detailed in facts, we must also bear in mind the contention of the answer of the Tool Company which is a defense as well as establishing, we believe, the basis for affirmative relief—that there is a conspiracy, certainly concerted action among these various defendants. These are not bare, naked allegations.

The deposition taken to date, the documents obtained to date, establish a course of conduct which unquestionably requires an inquiry.

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May I suggest, your Honor, where do they think they are going to find out their misdeeds, in our files, through our people, or in their files? Where are the facts to be found as to whether or not there has been an unlawful course of conduct on the part of these additional parties? Through the [fol. 1076] Tool Company or through their own files and through their own witnesses? That is what they want to avoid. I understand why they want to avoid it.

There would have been technically the basis of making such a contention if the answer we had filed had been one as bare of facts as the complaint is. We took great pains to avoid that charge.

Judge Bromley has indicated or referred to a Mr. Thomas as an example where he believed that he is being prejudiced if the deposition of Mr. Thomas should take place before he has had an opportunity to examine the Tool Company, and he said because the answer that we filed contends and asserts facts to support the contention that Mr. Oates and Mr. Hagerty, also someone at Dillon-Reed, had conversation with Mr. Thomas which we contend encouraged Mr. Thomas to leave TWA in 1960.

We have to find some place to find facts. He is as a good a place as any.

The other is to go into an examination of Mr. Oates, Mr. Hagerty, and Dillon-Reed. These are the two places to find them. We can't answer that question. I don't see anything [fol. 1077] difficult about it.

I might as well say on this point, while on the subject of Mr. Thomas, it might be a good idea perhaps to take the deposition of some of these—or to change the order in which the deposition is being taken. I do have in mind making an application to the Special Master at an appropriate time that I believe I have the basis for now for changing the particular order of the depositions to be taken because I believe that the order of your Honor, with respect to taking these depositions, was that we were to keep at it without wasting time because I believe the responsibility for an orderly development of the facts is on counsel, and wholly on counsel.

Certainly, it is not the responsibility of opposing counsel to develop or establish the order in which the defendant is

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to develop the facts in order to defend himself, and we are defending ourselves.

So I respectfully submit, your Honor, if I may add one more point, that your Honor may not be fully aware unless you have had an opportunity to read this rather lengthy [fol. 1078] answer.

The Court: Nobody has taken the trouble to give me a copy. I read about it in the newspaper. That's how I know what is going on in this lawsuit.

Mr. Davis: It has been filed, I believe, your Honor.

The Court: It hasn't come upstairs. I signed an order for you this week, Miss Lea, but you didn't leave a copy with me.

Miss Lea: Yes, I did. I left an extra copy in chambers.

The Court: I will go look for it.

Mr. Davis: I apologize if we have not, and will see it is done immediately.

You will note in there that there is a contention that we assert quite seriously that the very commencement of this action by TWA was intended in furtherance of these other objectives.

Mr. Sonnett: Where do you say that in this answer? Point it out. That is a misstatement.

The Court: Let Mr. Davis finish his argument.

[fol. 1079] Mr. Davis: I submit that no matter which way you look at this the answer always comes out to the same place. We responded to an action commenced by TWA. TWA is in control of the same people. We obtain a priority, we are in the process of taking deposition. We ought to have an opportunity to complete the development of the facts.

The incidental fact that these same individuals who were noticed for their deposition covered by the decision by Judge Herlands now have been put on notice that they should defend themselves and protect themselves, I do not think puts them in a worse position, it puts them in a better position than they were in before we named them. If they want or need more time for replies, I am sure they will get more time to put in a reply. I think they may have difficulty in replying, because our answer is so detailed it

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is going to be difficult for them to reply to the facts alleged there in the manner in which I know they want to answer.

The Court: Have you considered the limitation of the deposition of these parties to matters raised solely by the [fol. 1080] complaint and not in counterclaims?

Mr. Davis: The Special Master raised the question should I get into an area that does not appear to be addressed to a defense to the complaint then a question may arise. We believe that we can establish that without any difficulty, and will establish it to the Special Master's satisfaction. I am confident that all or substantially all of the depositions that we will engage will relate to defenses to the complaint, construed broadly to be sure, since the complaint is very broad.

Now, should we reach the posture where it may be said that a certain amount of this inquiry appears to have more bearing on establishing a cause of action against these additional defendants rather than establishing the basis for defense, bearing in mind all the time if they can prove they did it, we didn't do it, we have a practical question there. Should we at that point stop for the purpose of starting the process all over again in order to give them what, this so-called priority?

[fol. 1081] The Court: It is a variable right, isn't it, Mr. Davis?

Mr. Davis: It is when you don't know what you are charged with.

The Court: You fought for it.

Mr. Davis: I did, your Honor, and I was successful, may I submit, primarily because the complaint was so barren of any information, any factual conclusions.

I respectfully submit, your Honor, that you can read that complaint, and I will use it as a guide in the future, I think it is an extremely well-drawn complaint, but I defy anybody to figure out what it is that the Hughes Tool Company was suppose to have done, but from the conclusions, to justify the complaint. You can look at it from beginning to end, you will find something in one of the briefs submitted in one of these pretrial conferences, but you cannot find the factual contention which presumably must exist if the complaint is any good at all that what took place was not

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within the contemplation of the CAB order which approved every transaction involving more than \$200 between the Tool Company and TWA, and if those transactions were approved by the CAB the antitrust laws are not applicable, [fol. 1082] and that is the only basis of jurisdiction of this Court.

You can look at that complaint from beginning to end, and I defy anyone to be in a position to defend themselves or to know what it is that they are talking about, and the briefs that have been submitted in one of those pretrial conferences had bold assertions that everything was being done for some purpose or motive, allegedly unlawful, but what is it that we are supposed to have done that was not covered by a CAB order? That does not appear on the face of the complaint.

What it is that constituted this wilful and malicious interference in the business—

The Court: We will leave that for motions of summary judgment which you are threatened with.

Mr. Davis: That is not entirely out of the ball park, either.

The Court: I didn't knock it out of the ball park. I said we agreed about six months ago you couldn't move for a summary judgment just on the complaint, and that under the decisions of our Court of Appeals you have to practically wait until all deposition proceedings were completed [fol. 1083] before the Court thinks it is proper to entertain a motion for summary judgment. I didn't foreclose you, I just said we will get to that discussion later on.

Mr. Davis: I appreciate that, your Honor, and I think we all agree it is a difficult motion to support and, therefore, one that should not be made hastily.

I do think that there is a technical deficiency in the complaint in the respect that it does not allege a violation of CAB orders. I think we also have the question of primary jurisdiction involved.

The Court: Make that for a separate application on papers.

Judge Bromley, what time do you want for your motions?

Mr. Bromley: Ten days, your Honor.

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The Court: You can have as much time as you want because the depositions are going to continue.

Mr. Bromley: Ten days.

The Court: All right. You fix any day you want with counsel, and arrange for exchange of papers, and notify my [fol. 1084] chambers, and we will have a hearing.

Mr. Davis: The only thing I may request in that, your Honor, I am sure Judge Bromley wouldn't object to it, and that is to give me an adequate amount of time to answer after receiving his papers, particularly since the Special Master is keeping my nose to the grindstone a little bit and I do need some consideration on time to reply.

Mr. Bromley: You will never have time enough to give a good answer. I will give you all the time you want, though.

Mr. Davis: Thank you, Judge.

Your Honor, do you want that reference Mr. Sonnett asked about?

The Court: No.

Mr. Browley: I must deny, if it please your Honor, that my clients control TWA. Their sole power is to appoint voting trustees.

Now, although the counterclaim is a very long and voluminous document it is so distorted, confused and inaccurate that the need to clarify it by discovery is far greater than is Mr. Davis' need against a notice form of pleading which the rules allow such as this complaint is, so the wealth [fol. 1085] of detail that he has put in his counterclaim as contrasted with the bare bones of the complaint only adds to our burden, it doesn't lessen it, because we have to sift out all the inaccuracies, distortions, and omissions by discovery in order even to be able to answer the charges.

The Court: May I suggest this. I understand Mr. Kaminer and Mr. Stewart and Mr. Neaher—I suggest that you arrange a date for a hearing allowing sufficient time for the preparation and service of your papers, and preparation and service of the answering papers by defendant, and if you want time to reply, and just check with my chambers as soon as you have a date fixed just to make sure that I set it aside and am free.

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Mr. Sonnett, you are going to give me a memorandum on the decisions in this district on priority?

Mr. Sonnett: As applied to this case; yes, your Honor. And may I simply invite your Honor's attention to the fact that in the second paragraph of his opinion and order of August 14, 1961, Judge Herlands specifically referred to the understanding of counsel.

[fol. 1086] The Court: Mr. Sonnett, we have gone through this every time we sit down. We go back to the interpretation of what happened before Judge Herlands. We have gone past that. We have an order set. You have a Special Master who, in my opinion, is one of the ablest lawyers in the United States, presiding over your deposition proceeding. We have an order set, and we should go on instead of having to go back to decide what was said before Judge Herlands.

Mr. Sonnett: I believe that is so, and I hope will be so, and that is why I urge you to put in the order as you should have originally, making it an alternating program.

Mr. Bromley: Does your Honor—we have a memorandum of law which we have filed and which I assumed you have.

The Court: I received it this morning. I have a memorandum from you, and I received one from Mr. Davis this morning, also.

Can I have yours on Monday, Mr. Sonnett?

Mr. Sonnett: Yes, your Honor.

The Court: It shouldn't be too difficult.

Mr. Sonnett: No, it will not be difficult.

[fol. 1087] Mr. Kaminer: May I hand up our bare bone papers just for the record? There is one thing which concerns me, and I am not sure, perhaps I misunderstood your Honor.

Did you—

The Court: First, Mr. Neaher, did you have any papers you wanted to submit, or do you want to rely on the record?

Mr. Neaher: I would like to rely on the record, but still reserve the right to submit a formal notice of motion.

Mr. Kaminer: Your Honor said depositions are going to go on. Are we considered from now on bound by them? I don't know what you mean.

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The Court: I would assume you have to complete Mr. Tillinghast, you have two or three other TWA witnesses.

Mr. Sonnett: Tillinghast has had about ten days, and counsel has declined as yet to give an estimate of when he will be through.

The Court: I don't have a copy of the schedule before me, but I don't think anybody is involved who are related to the defendants.

Is Mr. Thomas—no, Mr. Thomas is now an individual, is [fol. 1088] he not?

Mr. Sonnett: The difficulty, your Honor, is that the subject matter of the Tillinghast examination, which has extended far beyond what it could have been, a day or two, is the so-called counterclaim approach that Mr. Davis has now invoked into the case, so that unless—if he is allowed to go on examining in aid of his counterclaims, and at his present rate—

The Court: Has the Special Master made any ruling as to the scope of the depositions?

Mr. Sonnett: The Special Master has raised this very point and suggested this is something that counsel should consider, and then said something to the effect, "Well, it might be rather difficult to administer," and I think there is something to that point, but I think that it is clear because I argued to him this very point. I have said to him, in all good faith, the deposition of Tillinghast could have been completed in two days, because he is a witness in the first six months of 1961, that is all he knows anything about. But instead of that we have had extensive day after day after day about events post-filing of the complaint designed [fol. 1089] to establish this so-called conspiracy which in its very inception is supposed to have started in September, 1960, and our complaint covers 1939 through the period to June 30, 1961, so we have had nothing by way of what is really involved in the case except the last six months of it.

The Court: When the schedule of witnesses, Mr. Kaminer, or Judge Bromley, or Mr. Stewart, or Mr. Neaher, is so arranged that one of your clients has been scheduled, then I suggest you make application to the Special Master, or to me, rather to the Special Master, because he is com-

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pletely competent to handle the problem, but I want these depositions to continue as much as possible. I want to get this case moving and disposed of.

Mr. Kaminer: Here is what I was going to suggest as a practical matter to avoid making an awful lot of applications to your Honor and to the Special Master. While your Honor is considering this question of priority and modification of that order, and your Honor will have to consider the motions to dismiss the joinder, we certainly do not object to the depositions going on as far as TWA witnesses are concerned, but we want to be assured, first of all, that [fol. 1090] there will be substantial time in which we can prepare our witnesses and go over all the facts and learn about all these documents, and I think your Honor only can indicate that now because that seems to me—

The Court: Well, I think you have a copy of the order, and I don't have a copy of it.

Mr. Kaminer: One of my witnesses is scheduled for March 1st, which is next week.

The Court: You have Charles Thomas, you have Bank of America, Bankers Trust, Morgan Guaranty Trust, the Mellon Bank. Up to that point you have no witness whose employer has become a party, right?

Mr. Kaminer: That's correct, your Honor.

The Court: I will have this decision out next week.

Mr. Davis: Your Honor, may I say that I do expect to make an application to the Special Master with respect to this order. I can't, of course, make any representation to the likely result, but that may help or give Mr. Kaminer a different basis for making an application.

The Court: Let's proceed until we are actually faced with the problem.

[fol. 1091] Mr. Kaminer: Very well, your Honor.

(Whereupon, at 12.40 o'clock p.m. the proceeding was concluded.)

Reporter's Certificate to foregoing transcript (omitted in printing).

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[Doc. 217]

[CAPTION]

61 Civ. 2324

[APPEARANCES]

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This matter was presented to the Special Master with extended argument and numerous briefs, all of which have been carefully considered. The issues now to be determined by the Special Master are the purpose and extent of the attorney and client privilege, whether such a privilege protects communications of an attorney while he is acting as a business agent on behalf of the client and how the privilege may be waived when it is recognized that certain evidence is privileged except for the fact that a waiver under the law [4362] has occurred.

Determination of these questions is now to be made as applied to certain documentary evidence in the custody, control or possession of the Hughes Tool Company claimed to be privileged because it involves communications between defendant and one or more of its several outside attorneys. Once determined in this proceeding, however, the principles of law as to when there is a privileged communication between attorney and client which precludes the production of documentary evidence subject to such privilege, and the manner in which the privilege can be and is waived shall apply to other parties to the litigation.

The facts concerning the various communications between the Hughes Tool Company and its outside counsel which the Tool Company now claims is privileged and further

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asserts that it is not required to produce for examination by the other parties to the litigation because of the attorney and client relationship, are not complicated. However, there are several aspects of the problem by reason of records in the hands of outside [4363] attorneys as well as those in the possession of the Tool Company that make the case and the several evidentiary questions in issue, materially different.

First, Raymond Cook, one of the principal outside attorneys for the Tool Company for the period after 1955, has advised the Court that he may well have to be a witness in this proceeding and has already filed a lengthy affidavit sworn to as of November 22nd, 1961, in a proceeding now being heard before the Civil Aeronautics Board in what is called Tool Company—Northeast Control Case, Doc. No. 11620. A copy of that affidavit is attached to the affidavit of Thomas D. Barr, one of the attorneys for the additional defendants, Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr., and Harry C. Hagerty, and sworn to as of March 26th, 1962, and filed in this proceeding. The Cook affidavit consists of 40 paragraphs with a number of subparagraphs and is 22 pages long. It will not be necessary to go into the detail of the affidavit of Mr. Cook at this time, but we shall refer to it so that it [4364] may be examined at length by those who care to do so. I shall call attention to various parts of it later in this Opinion. It is apparent from the affidavit that although Mr. Cook was and is an attorney, he was stating information that came to him in connection with the financial business affairs of the Tool Company for an indeterminate period of years. He was also relating at length what he considered to be the facts concerning

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many matters and transactions in which the Tool Company was involved during the period described in the affidavit.

It is incumbent upon the Special Master to examine this affidavit with care to determine what portion of Mr. Cook's activities might have been privileged because of the attorney and client relationship if no waiver had occurred. It also has been necessary to decide what part of what he did involved acting as an ordinary agent, or as a business agent on behalf of the client, and would not be properly within the privilege of attorney and client. We needed to ascertain the extent of the waiver that occurred by reason of the Tool Company authorizing the filing of the [4365] affidavit in question and its advising the Court that Mr. Cook was to be a witness in this case regarding a number of the important issues.

Determining the question at hand, it is also necessary to consider the affidavit of Raymond M. Holliday, Vice President, Secretary and Chief Financial Officer of the Tool Company which was sworn to on November 22nd, 1961, and filed in the same proceeding before the Civil Aeronautics Board, referred to above. In his affidavit, Mr. Holliday adopts the affidavit of Mr. Cook which I have referred to, both as to the facts and the conclusions. However, he adds additional assertions as to the facts in issue in this case.

In paragraph No. 4 of the Holliday affidavit, Mr. Holliday says: "It is inconceivable that Tool Co. which has an equity interest in excess of one hundred and forty million dollars in TWA, including debts in an amount in excess of eighty million dollars, would maliciously and willfully interfere with TWA's business. It has not done so. Rather it has acted on the advice of counsel to take steps which its counsel

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advised were required to protect its equitable rights arising from [4366] its ownership in TWA." As indicated herein-after, the Holliday affidavit and particularly paragraph No. 4 thereof has an important bearing upon the waiver question.

In the answer which the Hughes Tool Co. filed in this proceeding in the paragraph numbered 40, it said: "All of the activities of Tool Co. alleged in the complaint with respect to the period subsequent to 1960 were taken on the advice of counsel for Tool Co. solely for the purpose of protecting Tool Co.'s interest as beneficiary under said voting trust and as equitable owner of more than seventy-eight per cent of the stock of TWA." This portion of the answer affects the question of whether any attorney and client privilege which might otherwise exist with regard to the period after 1960 has been waived.

The record shows that the named defendant Howard R. Hughes, who has not yet been served in this action, was not an officer or director of the Tool Company after the end of the year 1960. It has also been stated on the record a number of times and apparently is accepted by all of the parties that Mr. Hughes is the sole stockholder [4367] of the Hughes Tool Company. There is no showing that after the close of 1960 Mr. Hughes was authorized to act on behalf of the corporation in any capacity other than as its stockholder. There are numerous communications in question between Mr. Hughes and various outside counsel for the period starting with 1961, from the beginning of the year, and at least up to the time shortly before this litigation was instituted.

The affidavit of Mr. Cook is much too long to try to set it forth in detail in this opinion. However, a careful con-

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sideration of its purpose and what it purports to present as well as the various subjects delineated will be of help in the consideration of our problem.

It should be observed that Mr. Cook said that he was familiar with the "facts and circumstances" which he set forth and that he participated as counsel for the Tool Company in TWA's jet equipment program and the financing thereof from their inception. He then discussed what he referred to as "facts known to me." Paragraphs 17 through 33 deserve careful consideration as to the subject matter concerning which Mr. Cook said he was [4368] presenting facts on behalf of the Tool Company.

Some of the specific subjects covered were: the recognition by the Tool Company that if TWA were to maintain its competitive position it would require a fleet of jet aircraft as soon as its principal competitors; advice that the Tool Company received from investment bankers and the necessity for TWA to have additional equitable capital in order for permanent financing to be accomplished. He then referred to discussions with Equitable concerning its requirements for the permanent financing for TWA and the fact that the Tool Company was not satisfied with these discussions. Further, there is the development of the plan for permanent financing through a leasing arrangement and the Tool Company's belief that TWA would be in a position independently to finance its jet equipment program.

He then referred to the Tool Company's negotiations with Irving and its agreement to support the Dillon Read plan. There is a reference to advice by Irving through Sessel and the Tool Company's decision not to seek or negotiate any interest rate until after Irving had formed

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[4369] a banking group. It is stated that representations were made to the Tool Company by Sessel and the Tool Company protested with respect to these representations, and when it was informed about interest rates, agreed to the interest rates but did not know that Irving had refused to permit other banks to participate in the plan. Mr. Cook also referred to Dillon, Read's advice to the Tool Company as to the interest rates. He made a statement concerning the lenders' commitment to the Dillon, Read plan and the Tool Company's guarantee agreement. He discussed the problem concerning Thomas's compensation and advice that the Tool Company gave to the lenders, as well as the various alternative suggestions for Thomas's successor and the fact that the Tool Company regarded the lenders' reliance upon Thomas's resignation in making their demands concerning management, as merely the use of an excuse to accomplish their objectives.

The affidavit then described the Tool Company's agreement to the financing plan in March 1960; advice that it received on August 1, 1960, from the lenders that they would insist on [4370] a voting trust; and finally that the Tool Company did agree in March 1960 to place its stock in a voting trust although it was unwilling to so agree under certain conditions. Then he referred to the Tool Company position as to demands made by the lenders and its request to Irving to develop an alternate plan. He asserted Irving's representation to the Tool Company concerning its inability to develop such an alternate plan and its refusal to permit participation by other banks, although this was unknown to the Tool Company.

Other paragraphs of the affidavit described the ability of Irving to apply economic pressure on the Tool Company

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and Irving's presentation to it, of the bank plan. He related the Tool Company's doubts about General Dynamics' ability to participate in the plan, how those doubts were confirmed and the protests that were made to Irving. Then he went into the Tool Company's presentation to Irving of its own plan, the bank meeting of October 6, 1960, and finally the Tool Company's accession to Irving's demand on certain conditions.

[4371] The affidavit related how the first time that demand was made upon the Tool Company by the Metropolitan Life Insurance Company that the Tool Company's right to terminate the voting trust be subject to a penalty and that the Tool Company promptly submitted to the Equitable an alternate proposal and Irving then refused to participate in the alternate plan. He stated that after this both Equitable and the Metropolitan indicated their willingness to reinstate the Dillon, Read plan provided the Tool Company met the additional demands and Irving made a similar proposal to the Tool Company.

Mr. Cook then described how the Tool Company endeavored to negotiate a reduction of the premium after it received the October 19th letters and finally made an oral agreement to accept the lenders' demand subject to the understanding with Irving that it be submitted back to the Board of Directors, and Mr. Sessel's account of that understanding which Mr. Cook claims were incorrect. Thereafter, the Tool Company proceeded to cancel its commitment.

He related that the Tool Company made a further effort to develop a new plan for financing [4372] and upon failure of that, the 1960 financing was consummated.

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Mr. Cook then developed the position that the Metropolitan and Equitable acquired and maintained control of the business and affairs of TWA, the Tool Company's expectations on the interest rate, and finally the lenders' demand that the Tool Company turn over control of TWA to them upon terms calculated to perpetuate the control that they had achieved.

Upon a consideration of the detail of the affidavit, it is apparent that it purports to be based on information which Mr. Cook received as counsel of the Tool Company. It is also obvious that it deals with that company's state of mind, position, attitudes and agreements with third parties as well as representations which he stated such third parties made, concerning the matters described in the affidavit. In many respects the affidavit parallels the allegations in the answer and counterclaims.

[4373] The applicable law involves a variety of legal principles. First, it should be recalled that this is not an action which depends upon diversity of citizenship for the Federal Court to have jurisdiction. The right to recover treble damages and obtain an injunction for violation of the Antitrust Laws is one that is created by the Federal Statute and did not exist at common law. See *United States vs. Addyston Pipe and Street Company*, 85 Fed. 271, 6th Cir. 1898; *Standard Oil Company of New Jersey vs. United States*, 221 US 1, 1911; and *Apex Hosiery Company vs. Leader*, 310 US 469, 1940. For this reason we do not have the problems relating to the distinction between substantive procedural statutes and rules of law, which must be dealt with in diversity cases under *Erie vs. Tompkins*, 304 US 64. However, even in a diversity case,

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Federal Courts have held that they are not precluded from deciding that a statutory privilege need not be allowed. *Monarch Insurance Company of Ohio vs. Spack*, 281 Fed. 2nd 401, 5th Cir. (1960) and *Humphries vs. Pennsylvania Railroad Company*, 14 F.R.D. 177 US District Court, N.E. Ohio E.D. (1953) where it is said: "The con- [4374] clusion is sound that Federal Courts are warranted to view the problems pertaining to the attorney-client privilege in the light of the law of the Federal Court rather than the law of the State where the litigation occurs." Professor Moore has taken substantially the same position in his work at 2 Moore's Federal Practice, First Ed. 2641.

A symposium on "The Lawyer-Client Privilege": "Its Application to Corporations, The Role of Ethics, and Its Possible Curtailment, reported in the *Northwestern University Law Review* Vol. 56 May and June 1961, No. 2 at pages 235 to 262 presents a careful statement of the basis for the attorney-client privilege as it exists in the law. There it is said: "There is, perhaps, no principle of law which exists on a sounder basis, or which is supported by a more uniform chain of adjudication, than that which holds all information acquired by an attorney from his client, touching matters that come within the ordinary scope of professional employment, as privileged communications."

This symposium recognized that the purpose of [4375] the rule was to encourage the placing of full confidence in the attorney without fear of the disclosure of the secrets entrusted. It found that there were certain required conditions if documents or testimony were to come within the rule. They are:

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(1) that a professional relationship be established between the client and its legal advisor;

(2) that the communication must be confidential and not made simultaneously to third parties or be intended to be communicated to third parties;

(3) the communication must be relevant to the advice sought and

(4) the circumstances must indicate that it was intended to be confidential and

(5) the privilege does not encompass information gleaned from sources other than the client or his authorized agent even though acquired by the attorney in the course of professional employment.

The attorney-client privilege covers the action of the attorney as legal advisor. It does [4376] not extend to communications between directors, officers, or agents of different corporations, or to negotiations between such corporations which are made or conducted by men who happen to be members of the bar. Nor does it extend to communications made by a client to his attorney with the understanding that the information is to be imparted to a third party.

The privilege does extend to communications to or from lawyers where the documents were prepared to solicit or give an opinion, on law or legal services and such parts of them are privileged as contained or have opinions based on information furnished by an officer or employee of the corporation in confidence and without the presence of third persons. *Radio Corporation of America vs. Rauland Corporation* 18 F.R.D. 440, U.S. District Court N.D.

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Illinois, E.D. (1955) and United States vs. United Shoe Machinery Corporation 80 F. Supp. 357, United States District Court D. Massachusetts (1950).

As stated by Judge Irving R. Kaufman while a District Judge in *Commercio E. Industria Cont. vs. Dresser Industries*, 19 F.R.D. 513, U.S. District [4377] Court S.D. New York, (1956) "The privilege should certainly not be extended to communications between an attorney and his client pertaining to the attorney's negotiations with a third party over terms and details of business transactions." In applying this principle to the facts before him, Judge Kaufman further said, "While Mr. Schwartz is a reputable lawyer, of many years standing, due to the exigencies of the situation—the client being in Brazil and the parties to be negotiated with being in the New York area—he was called upon to perform the proper, practicable and convenient task of acting as the clients' alter ego in these business transactions. In this age of high finance and international commercial transactions more and more are lawyers called upon because of their integrity and business acumen to assist clients in their business dealings. Judge Levet previously rejected plaintiff's contention that the attorney-client privilege was applicable to this situation when he denied an application to vacate a notice by the defendant Dresser to examine Mr. Schwartz (citing the authority). For the reasons stated earlier I fully concur with Judge Levet's conclusion."

[4378] When it is found that the relationship between the attorney and the client meets all of the other requirements and does not involve action as a business negotiator or a present disclosure or contemplated future communica-

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tion to third persons there remains the further question of whether or not there has occurred a waiver either in specific terms or by implication. Professor Wigmore in his treatise on evidence examines the question of waiver, in a number of its aspects.

In Section 2327 of the 1961 Edition at page 634, he asks the question, "What constitutes waiver by implication?" He then answers: "Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, that is, not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended [4379] that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point his election must remain final.

"(2) The client's offer of the attorney's testimony in the cause at large is not a waiver so far as the attorney's knowledge has been acquired casually as an ordinary witness but otherwise it is a waiver for, considering that the attorney ought in general not to be used as a witness (Section 1911 *supra*), the client ought to be discouraged from utilizing his attorney in double and inconsistent capacities, and if he has seen fit to furnish him knowledge as a witness, he should deny himself the right to invoke the attorney's function as an advisor.

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"(3) The client's offer of his own testimony as to specific facts about which he has happened to communicate with the attorney is not a waiver, for the same reason as in paragraph (1) *supra*. But his offer of the attorney's testimony as to such specific facts is a waiver for the same reason as in paragraph (1) *supra*.

[4380] "(4) The client's offer of his own or the attorney's testimony as to a specific communication to the attorney is a waiver as to all other communications to the attorney on the same matter. This is so because the privilege of secret consultation is intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.

"(5) The client's offer of his own or the attorney's testimony as to part of any communication to the attorney is a waiver as to the whole of that communication on the analogy of the principle of completeness, (citing Section 2113 *supra*).

In Section 2328 of the same treatise, Professor Wigmore deals with waiver at a former trial. He says under waiver by joint clients, agents, assignees, "(1) A waiver at one stage of the trial should be final for all further stages, and a waiver at a first trial should suffice as a waiver at a later trial since there is no longer any reason for preserving secrecy."

These principles have been followed in this [4381] District in a number of decisions. *Knaust Bros. vs. Goldsclagg*, D.C.S.D.N.Y. 1939, 34 Federal Supp. 87; *Munzer vs. Swedish-American Line*, D.C.S.D.N.Y. (1940) 35 F. Supp. 493; and *Wild vs. Payson* (1946) 7 F.R.D. 495, 500.

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Wigmore's position as to the proposition that the privilege is not divisible has also been applied a number of times in this District. It is stated in the case of *In re Associated Gas & Electric Co.*, 59 F. Supp. 743, D.C.S.D. N.Y. (1944), in the following terms: "The petitioners having waived as to some of the letters relating to a specific subject open the door to all the privileged correspondence between it and its attorney on that specific subject. The Court cites for that proposition *Hunt vs. Blackburn*, 128 U.S. 464; *White vs. Thacker*, 5 Cir., 78 F. 862; *Western Union Telegraph Co. vs. Baltimore & Ohio Tel. Co.*, D.C. 26F.55; *Kunglig, Jarnvagsstyrelsen vs. Dexter and Carpenter*, 2 Cir. 32 F. 2nd 195; and *People ex rel. Brownell vs. Higgins*, 96 Misc. 485, 160 N.Y.S. 721. To like effect see *United States vs. Pellier*, 255 F. 2nd 441, 2 Cir. (1958) and cases cited therein.

Furthermore, once the waiver is made as [4382] Professor Wigmore says, it is general and it cannot be made special so as to be limited to a particular purpose or a particular person. See *People vs. Bloom*, 85 N.E. 824. The reasoning supporting this principle is developed at some length in the case of *McKinney vs. Grand Street P.P. and S. R. Co.*, 10 N.E. 544 where the Court said: "It is claimed by the appellant that the ban of secrecy having once been removed by the patient and the information having lawfully been made public the right to object further thereto had not been conferred. There seems much reason in this claim. The patient cannot use this privilege both as a sword and a shield,—to waive when it inures to your advantage and wield when it does not—after the publication, no further injury can be inflicted upon

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the rights and interests which the statute was intended to protect, and there is no further reason for its enforcement. The nature of the information is of such a character that when it is once divulged in legal proceedings, it cannot be again hidden or concealed. It is then open to the consideration of the entire public, and the privilege of forbidding its repetition is not conferred by the [4383] statute. The consent, having been once given and acted upon, cannot be recalled, and the patient can never be restored to the condition which, from motives of public policy, requires suppression of such information."

There seems to be no question but what it is the duty of the Court to examine the documents if there is a genuine dispute as to whether the privilege is applicable and determine the question. See *Ellis-Foster Co. vs. Union Carbide & Carbon Corp.*, 159 F. Supp. 917B (D.N.J. 1958); *International Min. and Chemical Corp. vs. Golding-Keene Co.*, 162 F. Supp. 137 (W.D.N.Y. 1958); *Zenith Radio Corp. vs. Radio Corporation of America*, 121 F. Supp. 792 (W.D. Del. 1954); *Bruun vs. Hanson*, 30 F. Supp. 602 (W.D. Idaho 1939); *Radio Corporation of America vs. Rauland Corp.* 18 F.R.D. 444 (N.D. Ill. 1955).

It also appears to be well established that the burden of proving that any communication is privileged is upon the person who asserts the privilege. *Humphries vs. Pennsylvania Railroad Co.*, 14 F.R.D. 177, (U.S.D.C. N.D. Ohio 1953), where it is said: "It is indisputable that one who claims a privilege has the burden of establishing affirmatively that the matters for which he claims the privilege fall within its coverage." See also *Mowell vs. Van Buren*, 77 Hun 569 (3rd Dept. 1894); *Banker's Money*

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Order Ass'n. vs. Nachod, 120 App. Div. 732 (1st Dept. 1907); Matter of Morrell, 154 Misc. 356 (Surr. Kings Co. 1935).

Applying these principles to the facts in the case we find that Mr. Howard R. Hughes had no official position as an officer or director with the Tool Company after the close of 1960. He was only its sole stockholder. The Tool Company has advised us by letter dated April 16, 1962, that there is such a community of interest between that company and Howard Hughes, that it produced all relevant files maintained by Mr. Hughes. It is also apparent from a number of the documents produced for examination by the Special Master that Mr. Hughes was active on behalf of the Tool Company, both before January 1, 1961 and thereafter.

The affidavit of Mr. Cook and other portions of the record show quite clearly that in many of the activities by Mr. Cook on behalf of the Tool Company he was acting as a business agent and not merely as a legal advisor. It also establishes [4385] that in his activities as a business agent he obtained information from a number of third parties and presumably communicated it to the Tool Company.

He also appears to have passed on to third parties information, positions, attitudes and claims of the Tool Company concerning numerous specific matters. Wherever Mr. Cook's actions or those of Mr. Davis or Mr. Bautzer would fit into the categories just described, and they were acting as business agents and not merely as lawyers or were expected to communicate information to third parties or receive information from third persons to be com-

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municated to the Tool Company, all of such communication and information and the full scope of it would not be privileged because it does not come within the basic requirements to qualify for the privilege.

An additional question is raised as to whether the motion of the parties in this proceeding under Rule 34 which have been sustained include documents in the hands of the parties outside counsel. The records, memoranda, writings and similar documents are described in the motions as those "in the [4386] possession, custody or control of Hughes Tool Company, (Toolco hereinafter referred to as Hughes Tool Company, and any concern or persons associated at any time with Hughes Tool Company, including its sole stockholder)." It would appear that such documents and writings in the hands of outside counsel of the Tool Company while not in the Tool Company's possession or custody would be within its control.

Several New York cases dealing with discovery under New York statutes and not under the Federal Rules of Civil Procedure so hold. They are *LeFever vs. Lefkowitz*, 178 N.Y. Supp. 2nd 172; *In re Buono's Will*, 179 N.Y. Supp. 2nd 717 and *Duncan vs. Hammond*, 190 N.Y. Supp. 2nd 1018. These cases hold that the attorney is but the agent of the client and it is sufficient that one person have in his possession, or in the possession of his agent or attorney otherwise under his control a paper which relates to the merits of the action. They also recognize that the attorney may have papers which are his own and distinct from those of the client and connected with the preparation of the case. Such papers although not work papers belong to the attorney [4387] as his own and not as the agent or representative

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sentative of the client and therefore not subject to the control of the client.

An example of this was a request for the typewriter that was used in preparing a will and all of the copies of writings prepared on that typewriter after the date the will was prepared—the Court held that the typewriter and such other writings were not under the control of the client and the client had no right to them and they were not producible since they were a part of the equipment and materials used by the attorney in the conduct of his office as an attorney.

[4388] It may be that in this case there are writings and documents prepared by outside counsel concerning matters that they were working on for the Tool Company that were either legal memoranda or factual memoranda that the Tool Company would have no right to demand as being within its control, or belonging to it, and in fact there may even be memoranda that the Tool Company did not expect to be made of various conversations or communications. Such writings would be outside the scope of the motions in this action.

CONCLUSIONS

Apart from the consideration of waivers the following conclusions are indicated:

1. Any party asserting the attorney-client privilege has the burden of proving the existence of that privilege as to particular documents, writings or testimony.
2. All parties under their Rule 34 motions are entitled to the production of any documents that deal with facts

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learned [4389] by counsel for the opposing party, from third parties, or sources other than the client, such as reports of conversations and negotiations with anyone not an officer, agent or employee of the client.

3. All parties are entitled under such motions to the production of any documents which were prepared by counsel when such counsel to the clients' knowledge was acting as its business agent in negotiating transactions or contracts.

4. The parties are entitled under their motions to the production of any documents which show on their face that there was no privilege by reason of the fact that the discussions in question were held or the legal advice given in the presence of third parties and to all documents dealing with matters as to which the client had knowledge that there was a waiver of the privilege by reason of communication of matters related thereto to third parties.

[4390] Concerning waivers, a party waives the privilege when it fails to assert its existence, or where it produces a portion of the subject matter by the testimony of counsel in affidavit or other form. Once having put a part of the subject in issue the privilege is waived so that the entire matter may be fully developed.

Where a party puts in issue by its pleadings, the advice of counsel and its right to rely on such advice, the privilege is waived as to all advice on the matter so placed in issue, including the basis for such advice, both legal and factual.

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ORDER

It is therefore adjudged and ordered that all parties to this litigation shall produce in response to the Rule 34 motions filed against them herein, all documents in their possession, custody or under their control, and in their hands or the hands of their agents or attorneys which come within each and all of the categories and classifications described under conclusions in the [4391] foregoing memorandum opinion.

Should any party have questions as to whether particular documents or writings come within the terms of this order for production, the Special Master will examine and rule upon such cases upon their being presented to him.

Dated April 17, 1962, signed by J. Lee Rankin, Special Master.

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[4401] I will sustain the motions to propound and have answered the limited interrogatories about the location of Mr. Howard R. Hughes. In so doing I want to make it very clear that this interference with the right of the Tool Company to proceed with its discovery is not a precedent for any other such interference, but is granted in recognition, in the first place, that much of the documentary evidence that the Special Master has ruled is not privileged and must be produced by the Tool Company with relation to its outside counsel, demonstrates a very active participation by Mr. Hughes on behalf of the Tool Company, and it is not realistic to assume from such materials that there were not common interests between the Tool Company and Mr. Hughes throughout the period involved in this litigation.

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tion—a common interest which went beyond that of the ordinary stockholder, and involved many important business decisions.

I am unwilling to preside as Special Master and permit the day to come when the [4402] parties would be entitled to take the deposition of Mr. Hughes, and then be unable to do so because they have been unable to locate him.

Furthermore, I am unwilling to sit here and allow what is brought to my attention, a large expense to be incurred, which will be damaging to TWA as well as the Tool Company, and all other stockholders of TWA, which expense would be incurred very largely or entirely for the purpose of trying to find out where Mr. Hughes is.

As far as I am concerned, if there is a cheaper or cheap way to acquire that knowledge, and make Mr. Hughes available to discharge his responsibilities concerning this litigation, the parties are entitled to it.

• • • • •

[fol. 1212] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 61-2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY, and
RAYMOND M. HOLLIDAY, Defendants,

—and—

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED
STATES, et al., Additional Defendants on Counterclaims.

INTERROGATORY PROPOUNDED BY PLAINTIFF TRANS WORLD
AIRLINES, INC.—Filed May 4, 1962

Now comes plaintiff Trans World Airlines, Inc., and hereby propounds to defendant Hughes Tool Company (herein Toolco) the following interrogatory pursuant to the orders of the Special Master, dated April 17 and April 30, 1962, and under Rule 33 of the Federal Rules of Civil Procedure to be answered under oath within fifteen (15) days from the date of service hereof by an officer of Toolco.

Interrogatory

1. State whether any officer, director or attorney of Toolco has any knowledge, information or belief as to:

(a) Where Mr. Howard R. Hughes (herein Hughes) has been during the last 30 days prior to the date hereof;

[fol. 1213] (b) Where Hughes is at the present time;

Interrogatory by TWA to Toolco, May 4, 1962

(c) Where Hughes will or presently intends to be during the period from the date hereof until July 1, 1962.

2. If the answer to any of the parts of question 1 above is in the affirmative, state

(a) As to 1(a) above, where Hughes has been during the last 30 days prior to the date hereof, giving sufficient information to have enabled one, not otherwise having knowledge of such facts, to have served process upon Hughes, including but not limited to the street address, including city, county, state and country, and including the exact location at such street address, such as room number and location;

(b) As to 1(b) above, where Hughes is at the present time, giving sufficient information to enable one, not otherwise having knowledge of such facts, to serve process upon Hughes, including but not limited to his street address, including city, county, state and country, and including the exact location at such street address, such as room number and location; and

(c) As to 1(c) above, where Hughes will or presently intends to be during the period from the date hereof until July 1, 1962, giving sufficient information to enable one, not otherwise having knowledge of such facts, to serve process upon Hughes, including but not limited to the street address, including city, county, state and country, and including the exact location at such street address, such as room number and location.

[fol. 1214] 3. If the answer to any of the parts of question 1 above are in the negative, state the extent to which inquiry has been made to support the negative reply.

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4. State whether Nadine Henley, Kay Glenn, F. William Gay, John Holmes, Michael Conrad, Robert Marsh, Sam Barber, Grant G. Horr, Joel L. Boyce and Robert Maheu, employees of or consultants to Toolco, have any knowledge, information or belief as to:

(a) Where Hughes has been during the last 30 days prior to the date hereof;

(b) Where Hughes is at the present time; and

(c) Where Hughes will or presently intends to be during the period from the date hereof until July 1, 1962.

5. If the answer to any of the parts of question 4 above is in the affirmative, state

(a) As to 4(a) above, where Hughes has been during the last 30 days prior to the date hereof, giving sufficient information to have enabled one, not otherwise having knowledge of such facts, to have served process upon Hughes, including but not limited to the street address, including city, county, state and country, and including the exact location at such street address, such as room number and location;

(b) As to 4(b) above, where Hughes is at the present time, giving sufficient information to enable one, not otherwise having knowledge of such facts, to serve process upon Hughes, including but not limited to his [fol. 1215] street address, including city, county, state and country, and including the exact location at such street address, such as room number and location; and

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(c) As to 4(c) above, where Hughes will or presently intends to be during the period from the date hereof until July 1, 1962, giving sufficient information to enable one, not otherwise having knowledge of such facts, to serve process upon Hughes, including but not limited to his street address, including city, county, state and country, and including the exact location at such street address, such as room number and location.

6. If the answer to any of the parts of question 4 above are in the negative, state the extent to which inquiry has been made to support the negative reply.

7. State whether any of Toolco's employees, agents, and/or representatives, including but not limited to those persons employed by Toolco in Los Angeles, specifically at 7000 Romaine Street and 915 N. Highland Avenue, who, during the year preceding the date hereof, have performed services of a personal nature or otherwise directly for Hughes, have any knowledge, information or belief as to:

(a) Where Hughes has been during the last 30 days prior to the date hereof;

(b) Where Hughes is at the present time;

(c) Where Hughes will or presently intends to be during the period from the date hereof until July 1, 1962.

[fol. 1216] 8. If the answer to any of the parts of question 7 above is in the affirmative, state

(a) As to 7(a) above, where Hughes has been during the last 30 days prior to the date hereof, giving suffi-

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cient information to have enabled one, not otherwise having knowledge of such facts, to have served process upon Hughes, including but not limited to the street address, including city, county, state and country, and including the exact location at such street address, such as room number and location;

(b) As to 7(b) above, where Hughes is at the present time, giving sufficient information to enable one, not otherwise having knowledge of such facts, to serve process upon Hughes, including but not limited to his street address, including city, county, state and country, and including the exact location at such street address, such as room number and location; and

(c) As to 7(c) above, where Hughes will or presently intends to be during the period from the date hereof until July 1, 1962, giving sufficient information to enable one, not otherwise having knowledge of such facts, to serve process upon Hughes, including but not limited to his street address, including city, county, state and country, and including the exact location at such street address, such as room number and location.

9. If the answer to any of the parts of question 7 above are in the negative, state the extent to which inquiry has been made to support the negative reply.

[fol. 117] 10. State the name of every person who participated in the preparation of the answers to the foregoing questions.

Cahill, Gordon, Reindel & Ohl, Attorneys for Plaintiff, Trans World Airlines, Inc., Office and P. O. Address, 80 Pine Street, New York 5, New York.

Interrogatory by TWA to Toolco, May 4, 1962

To:

Hon. J. Lee Rankin, Special Master, 36 West 44th Street,
New York, New York.

Chester C. Davis, Esq., Attorney for Defendant, Hughes
Tool Company, 120 Broadway, New York 5, New York.

Winthrop, Stimson, Putnam & Roberts, Attorneys for
Additional Defendants, Irving Trust Company and Ben-
Fleming Sessel, 40 Wall Street, New York 5, New York.

Cravath, Swaine & Moore, Attorneys for Additional De-
fendants, Equitable Life Assurance Society of the United
States, et al., 1 Chase Manhattan Plaza, New York 5, New
York.

Dunnington, Bartholow & Miller, Attorneys for Addi-
tional Defendant, Dillon Read & Co. Inc., 161 East 42nd
Street, New York 17, New York.

Chadbourne, Parke, Whiteside & Wolff, Attorneys for
Additional Defendant, Charles C. Tillinghast, Jr., 23 Broad-
way, New York 4, New York.

[fol. 1218] Affidavit of Service (omitted in printing).

[fol. 1220] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 61-2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY, and
RAYMOND M. HOLLIDAY, Defendants,

—and—

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED
STATES, et al., Additional Defendants on Counterclaims.

INTERROGATORY PROPOUNDED BY PLAINTIFF TRANS WORLD
AIRLINES, INC.—Filed May 4, 1962

Now comes plaintiff Trans World Airlines, Inc. and hereby propounds to defendant Raymond M. Holliday (herein Holliday) the following interrogatory pursuant to the orders of the Special Master, dated April 17 and April 30, 1962, and under Rule 33 of the Federal Rules of Civil Procedure to be answered under oath within fifteen (15) days from the date of service hereof by Holliday.

Interrogatory

1. State whether Holliday has any knowledge, information or belief as to:

(a) Where Mr. Howard R. Hughes (herein Hughes) has been during the last 30 days prior to the date hereof;

Interrogatory by TWA to Holliday, May 4, 1962

[fol. 1221] (b) Where Hughes is at the present time;

(c) Where Hughes will or presently intends to be during the period from the date hereof until July 1, 1962.

2. If the answer to any of the parts of question 1 above is in the affirmative, state

(a) As to 1(a) above, where Hughes has been during the last 30 days prior to the date hereof, giving sufficient information to have enabled one, not otherwise having knowledge of such facts, to have served process upon Hughes, including but not limited to the street address, including city, county, state and country, and including the exact location at such street address, such as room number and location;

(b) As to 1(b) above, where Hughes is at the present time, giving sufficient information to enable one, not otherwise having knowledge of such facts, to serve process upon Hughes, including but not limited to his street address, including city, county, state and country, and including the exact location at such street address, such as room number and location; and

(c) As to 1(c) above, where Hughes will or presently intends to be during the period from the date hereof until July 1, 1962, giving sufficient information to enable one, not otherwise having knowledge of such facts, to serve process upon Hughes, including but not limited to the street address, including city, county, state and country, and including the exact location at such street address, such as room number and location.

Interrogatory by TWA to Holliday, May 4, 1962

[fol. 1222] 3. If the answer to any of the parts of question 1 above are in the negative, state the extent to which inquiry has been made to support the negative reply.

4. State the name of every person who participated in the preparation of the answers to the foregoing questions.

Cahill, Gordon, Reindel & Ohl, Attorneys for Plaintiff Trans World Airlines, Inc., Office and P. O. Address, 80 Pine Street, New York 5, New York.

To:

Hon. J. Lee Rankin, Special Master, 36 West 44th Street, New York, New York.

Chester C. Davis, Esq., Attorney for Defendant, Raymond Holliday, 120 Broadway, New York 5, New York.

Winthrop, Stimson, Putnam & Roberts, Attorneys for Additional Defendants, Irving Trust Company and Ben-Fleming Sessel, 40 Wall Street, New York 5, New York.

Cravath, Swaine & Moore, Attorneys for Additional Defendants, Equitable Life Assurance Society of the United States, et al., 1 Chase Manhattan Plaza, New York 5, New York.

Dunnington, Bartholow & Miller, Attorneys for Additional Defendant, Dillon, Read & Co. Inc., 161 East 42nd Street, New York 17, New York.

Chadbourne, Parke, Whiteside & Wolff, Attorneys for Additional Defendant, Charles C. Tillinghast, Jr., 23 Broadway, New York 4, New York.

[fol. 1223] Affidavit of Service (omitted in printing).

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[Doc. 96]

[CAPTION]

61 Civ. 2324

Before: Hon. CHARLES M. METZNER, District Judge.

New York, May 17, 1962, 10 a.m.

[APPEARANCES]

• • •

[2] The Clerk: Trans World Airlines, Incorporated v. Howard R. Hughes, Hughes Tool Company, and Raymond M. Holliday, defendants and The Equitable Life Assurance Society of the United States, et al., additional defendants on counterclaims.

The Court: I don't have the TWA papers. Did you file them downstairs?

Mr. Sonnett: We submitted a very brief memorandum this morning, your Honor.

The Court: All right.

Mr. Sonnett: And TWA is resting on the main briefs submitted by Mr. Kaminer.

The Court: All right. Miss Lea.

Miss Lea: May it please the Court, may I first explain, your Honor, that up until this morning Mr. Davis intended to be here and at the very last minute found he could not. We apologize for his not being able to attend, and I am telling you this in kind of an anticipatory apology for my argument, as well, which might be a trifle disjointed under the circumstances.

The Court: You don't need any apology.

Miss Lea: The Tool Company is here seeking review of the Special Master's ruling primarily in so [3] far as said ruling is determined to have been a waiver of any attorney-

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client privilege which Toolco would otherwise be entitled to assert.

The Special Master was given an opportunity to review to some extent the documents with respect to which Toolco claimed privilege, and having reviewed them stated on the record in so far as he could determine from the documents themselves they weren't communications between attorney and client and communications which did contain legal advice and but for a waiver would be communications which would be subject to a claim of privilege and not producible.

Following some argument and the submission of memoranda on behalf of the various parties, the Special Master determined that Toolco had waived its privilege with respect to some of the communications between attorney and client by reason of the fact that an affidavit had been filed by Raymond Cook in a Civil Aeronautics Board proceeding, and that by reason of the fact that Toolco had pleaded as one of its defenses advice of counsel.

The question, it seems to me, when boiled down is really a very simple one. Waiver requires two elements. It requires a disclosure and it [4] requires a disclosure of communications otherwise privileged on occasion, and we think that in part, at least in this case, the determination of each of these elements requires inquiry into the facts surrounding waiver and into the facts surrounding the creation and existence of the privileged communication itself, and that on the basis of the record that the Special Master had before him at best there is no basis at all for a finding that a waiver had in fact taken place of any communications—any communications otherwise privileged.

Now, in so far as the Special Master found and the opposing parties urged that the affidavit submitted by Mr. Cook

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to the Civil Aeronautics Board constitutes a waiver, our position is this:

A reading of the affidavit, a reading even of those paragraphs which have been quoted by the defense, Irving Trust and Sessel, the memorandum submitted to your Honor indicate that the information which Mr. Cook supplied in the affidavit to the CAB and the statements which he made to the CAB was information and statements which came to him as, in effect, a witness to the events which had transpired, that is, that Mr. Cook observed events, participated in trans-[5]actions, and by reason of his observations and participation was able to execute an affidavit which related the facts involved therein.

Such a relation of facts is relation of material which is not privileged. The attorney, or any individual who observes facts and participates in events is on some occasions required, or at least in a position to state those facts and repeat those facts without there being any waiver of any kind. There can't be any waiver unless there is a privileged communication to the extent that he himself observes it and does not relate facts, or does not relate information which came to him from his client by way of a privileged communication. There is no privilege and there is no waiver.

This is a situation which applies to Mr. Cook's affidavit. The examples are quoted here in defendant Irving's and Sessel's brief, which indicate this, and I would just like to advert to them very briefly.

They begin on page 15, your Honor, and the quotes go on for several pages. Starting on page 15, paragraph 17—and I will briefly go to those portions which are underlined and which opposing [6] parties apparently think are most supporting of their point of view—they have here underlined from paragraph 17:

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"Accordingly Toolco and TWA did not seek to negotiate any interest rate until after Irving had formed the banking group,"

and then go on to say, underlining paragraph 18:

"When Toolco protested, notwithstanding the representations made to it by Sessel, no opportunity had been given to TWA to negotiate."

We can go on and on here, and it is apparent from a reading of all of these that these are objective, let me call them, facts, observable by Mr. Cook in the course of whatever it was that he was doing, which information did not necessarily come, and there is no indication from the face of the affidavit itself that this information did come to him in the course of privileged communications from a client.

These are things which he saw happening and these are things which he learned otherwise, say, as far as the face of the affidavit indicates than by communications from the client.

If this is so, then this information is not privileged. If the information is not privileged, [7] then the statement cannot be a waiver of any privilege.

The whole affidavit itself, I believe, is attached to our moving papers, and going through it even single paragraph by single paragraph fails to disclose one instance in which the affidavit itself recites or indicates, or in any manner tends to show that the information which Mr. Cook has put down therein is information which he got from the client in the course of a confidential communication.

That is our position with respect to the affidavit itself, except that I would say that to the extent that any of the opposing parties believe that they can show that any other statements contained in the affidavit were not statements

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learned by Mr. Cook in the objective fashion as distinguished by way of communications from the client himself, that such facts, or that a determination of such facts at the appropriate time may indicate that a waiver has occurred.

This is not our position. We don't believe that any such facts exist, that they could show them, but our position is that if, assuming arguendo such facts do exist, they must be shown and they must be placed on the record before there can be any proper [8] finding that a waiver has, in fact, occurred.

This has not been done. There is nothing in the record, except argument of counsel and memoranda, and this is an insufficient basis and it is certainly no factual basis upon which to find that a waiver has occurred with respect to the statements found in the Cook affidavit.

With respect to the second major point of contention which we have here, and that is on the pleading of advice of counsel, the Special Master determined that by virtue of the fact that Toolco [in] its answer had set up a partial defense to some of the allegations of the complaint, that the actions which it had taken, which were alleged to have been willful and malicious interference with TWA's business, were taken on advice of counsel, whatever those actions were, and they have not been determined yet.

The complaint was general. Mr. Tillinghast has testified with respect to some letters which he states constituted this willful and malicious interference, and if that is all that TWA claims we have one situation. What more they claim, we don't at this moment know.

However, the Special Master determined that [9] merely by virtue of pleading this, putting it in our answer, we have waived the attorney-client privilege with respect to such materials.

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Again, we think that this was error. We think it was error because the ruling failed to take into account one of the two essential elements of waiver, which is that there must be a disclosure of the confidential communication. Merely saying that you relied upon advice of counsel without saying what the advice of counsel is, is not a waiver. It is not a disclosure of any privileged communication. Until you have had that disclosure, you are not entitled to assume that there has been a waiver and you are not entitled to look at documents otherwise privileged.

Now, the fact that having set this up as a defense, Toolco may be required at some point, at some appropriate point to disclose what it is it is relying on of advice of counsel and may say that relying on merely a statement of counsel in and of itself is a disclosure of communications sufficient to waive the privilege. We don't believe it is. Whatever we may be required to do at a later point, will happen then.

[10] We are talking as of then, and the waiver as of today, we submit, has not occurred by reason of the pleading in the complaint itself.

This advice of counsel, aside from the problems with it that I have already indicated, become somewhat more complicated by the fact that what the advice was, what the client relied upon, what the scope of the defense itself is are again much as in the case of the affidavit questions, which require determinations of fact and which require inquiry into facts. Without knowing the underlying circumstances one can't say, one can't determine the breadth of the disclosure, assuming that a disclosure has, in fact, taken place, or the breadth of the waiver.

Again, we submit, that the Special Master was in error in determining on the basis of no facts at all, but merely on the basis of the pleading itself, that—and he has found a

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very broad waiver of the attorney-client privilege on the basis of this pleading.

In summary, it is Tooleo's position that at this point there is no basis in the record upon which a finding of waiver can be predicated.

It is further our position that neither the [11] Cook affidavit nor the pleading itself is any waiver of the attorney-client privilege.

We respectfully request that your Honor reverse the ruling of the Special Master in this respect.

The Court: Mr. Kaminer.

Mr. Kaminer: May it please your Honor, I have been selected by my colleagues to save your Honor's time and to present the argument to you so there won't be so much duplication.

My first point is that the appeal is, of course, entirely untimely. I don't know whether your Honor had a chance yet of reading our memorandum. I am merely asking this because I don't want to bore you by repeating too much.

The Court: You go on and make your argument.

Mr. Kaminer: I will, sir.

In the first place, the Special Master set a time, which he then extended, for ruling, which was the appeal had to be noticed—a notice of appeal had to be filed by April 27th. This was the extended time.

On that day, my learned opponent sent a letter to him interpreting the opinion of the distinguished Special Master as being academic shadow-boxing and said, "Of course, this is all very well, but we don't have to produce anything."

That is the import of the letter and it is in this memorandum which we handed to your Honor.

The Special Master writes back on the next business day and says, "This is not so at all." There is more correspond-

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ence, and the Special Master specifically said, "I will not make a new order to extend the time to file a notice of appeal," and indeed, he said, "I will not regard you in default for not complying with giving these documents over right away until such time as Judge Metzner shall determine either that the time for an appeal has expired, or that the order should be sustained," et cetera.

The Court: Let's assume that we are dealing with the substance now and not the question of whether—

Mr. Kaminer: I will come to it right away, your Honor. What has happened here in this case—and I am not saying this against my very charming opponent who is arguing here today. I didn't expect to have to confront her. I rather expected to con-[13]front Mr. Davis.

The Court: Oh, I don't think Miss Lea is going to rest on her charm to defeat your argument and put you in an unfavorable position.

Mr. Kaminer: What I have to say is no reflection on her. That's what I want to say.

Miss Lea: Thank you.

Mr. Kaminer: We have been getting the worst run-around which I believe this Court has ever heard of. Arguments have been made over and over and over again, the same arguments, and now we are still here and haven't got the documents to which we are entitled.

Miss Lea has cut the subject a little shorter than it is and the distinguished Special Master's opinion is a little broader than what you heard about.

Now, here we have Mr. Cook, who is an outside lawyer from Texas, whom your Honor has seen, who, as his own affidavit and the other affidavits in the binder show, has acted as the negotiator all the way through.

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That is a method of Mr. Hughes. He sends lawyers and then later on we are told, "Oh, well, these [14] were lawyers, too bad, it's privileged."

The law is very well conscious of that kind of thing. There are two principles of law firmly established; one, if a lawyer is a negotiator, no privilege.

My friends have cited something in their brief, but they don't always like to cite the full, relevant parts that they heard, which, of course, is human and quite understandable, but the fact of the matter is that in the very article which they cite as saying that the burden hasn't been overcome, it is said that where it is shown that the lawyer has acted as a negotiator there is no privilege and the Master has so found and the basis for his finding are the facts in the Cook affidavit and various other facts to which I will refer.

Now, as far as waiver is concerned, waiver comes about in a variety of ways, and once it is made it cannot be recalled.

A waiver occurred here, first, when Mr. Cook filed this affidavit, which is a part of this record here, having been made so by other affidavits, and in which he disclosed not just what he learned from third parties—there have been read just a few [15] of the excerpts—but the state of mind of the Tool Company, what they concluded, that they decided they wouldn't negotiate this, that they decided they would do that.

Now, all that could have come only from the Tool Company, or Mr. Hughes, which is the same thing, the alleged client, and the affidavit says the facts herein came to me as counsel.

Now, his own affidavit says that. He can't go back on that. The Special Master pointed that out in his opinion.

You are told that the Special Master in view of the documents said on the record that they didn't seem to him to—

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I forgot what Miss Lea said—to be anything but—to contain any factual communications.

Well, first of all, the fact is that the important papers have never been shown to him, as far as I know, because after that statement by the Master, the Master inquired whether all the files of the Cook firm and Mr. Bautzer had been shown, and I know of no fact that they have been shown, but that is utterly immaterial.

Whether they have all been shown to him or [16] not, the fact of the matter is that the Cook affidavit clearly sets forth facts, A, which show that Cook was the negotiator so there was no privilege anyway.

The law has said and the Master has cited to you in your brief that if a client uses a lawyer not in the proper way for which a lawyer should be used, that is, to give legal advice, but as a negotiator there is no privilege and we have cited you a lot of cases.

The fact is also, as the Master has set forth with abundant quotes, that where you call a witness in whatever form and proffer—and that witness is a lawyer and you proffer that witness' testimony, that is the end because the law does not favor that kind of thing.

You have seen, no doubt, the quotations from Wigmore, and the cases supporting it.

Now you are told that, of course, this waiver in the answer about legal advice doesn't mean anything because the legal advice isn't disclosed.

Well, there are two very interesting cases on this subject, both in New York. The first one is *Smith v. Bentley* and the pleading said that the defendant had paid a portion of the royalties in [17] question to another defendant upon the advice of his counsel that he was legally entitled thereto.

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That's just exactly what is disclosed here, that all the actions of the Tool Company with respect to the matter alleged in the complaint were taken upon advice of counsel.

In another case by Judge Learned Hand—it was quite an interesting case. It is called *United States v. Cotter*—this occurred: It was a criminal case and the defense suggested that they had employed counsel to advise them when they had been investigated and that, therefore, the lawyer would not have countenanced any ill will. Mind you, they did not say what the lawyer said.

The prosecution, in addressing the jury, suggested that if this was the case, the defendants should have called the lawyer and that the prosecution couldn't have done so because the communications would have been privileged.

The Court of Appeals said that all the defense arguments were no good and then quoted that the defendants might, however, have made an even better argument. They might have added that their own argument about counsel was itself an [18] abandonment of any privilege, whether it had originally existed or not.

Now, the record is full of waivers. You cannot do your business by lawyers and then hide behind alleged privilege. You are to use lawyers as counsel, but when you put them on the stand, when you plead their advice, that is the end of privilege.

And an interesting thing is that throughout this case there has been an enormous reluctance to comply with one of the most fundamental questions, namely, that if you are claiming privilege and withhold an otherwise relevant document—your Honor understands there is no question here of relevancy; these are documents called for by the orders. This is not a case your Honor recently decided; this is a case of whether or not they are privileged—when you claim

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privilege and it is challenged, you have got to submit it to the Court.

Some documents were submitted. Now, in this very brief again, which they submit to your Honor today, we are told that there is not enough to make it necessary to submit them.

I think it is on page 5. The Master has said, one, there has been a complete waiver of anything, [19] of the subject matter which Mr. Cook described in his affidavit. We have summarized what the subject matters are, but you will find they are identical to 99 per cent of the allegations of the counterclaims.

And they state what Tool Company did and why it did it and how could that have come from third parties, their state of mind. And that is what the Master pointed to.

You have a pleading which says we relied on advice of counsel in doing the acts which the complaint complains of here, and, of course, as the Master pointed out in one of the letters which he had to write because his, I thought, very clear and learned opinion was not clear to my learned friends, he said, "You have to produce everything written since 1960 which is relevant," and anything which was before counsel—and this is what we are really talking about—they write letters attacking, let's say—to give a good example and a very relevant one—the voting trust.

Of course, when you do that and say, "We did this on advice on counsel," then everything which was before counsel and formed his advice comes in.

I remember two cases in point which I cited on the record before the Special Master. We didn't [20] put them in our brief, just by oversight. I will try to get it out fast. But they were dramatic.

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In one case a lawyer's advice was pleaded as a defense. That opened the door to any other advice which the client had received on the subject matter and it turned out to the great chagrin of the party that he had first consulted the lawyer who said, "You can't do this."

Then he consulted a lawyer who said, "All right," so he pleaded that second lawyer's advice. You cannot have a partial waiver.

And I was in a case where a special master—a hearing examiner, a judicial officer of the Federal Government—held this—it was also very dramatic when it happened—and that case is American Cyanamid, Docket No. 7211 before the Federal Trade Commission.

There a letter had been written to the Attorney General of the United States in 1955 by counsel saying that the client had been advised that a certain patent was invalid.

Many years later, an antitrust proceeding was instituted and it was ruled that that letter opened the door to all communications with counsel on this question of the validity of the patent.

[21] Of course, you cannot waive partially. That would be a wonderful thing and there are a lot of cases which tell you and point out graphically how unjust it would be if you could just disclose that much.

Now, my friends say the time hasn't come. Well, we have been at it for a long time. Your Honor has been at it longer than we additional defendants.

The time had come to produce these documents on March 15th. That was when the time had come under the orders of the Court and of the Special Master, but we are told we have to take testimony when we have the sworn affidavit in the record which says that the man who made it learned the facts as counsel—we quoted that portion—and which shows

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the state of mind of the company; when we have a pleading in the case, when we have additional affidavits which are also in the binder, filed in this very case, and, in addition to all of that, we have another affidavit of which you haven't been told a thing. That is the affidavit of Mr. Holliday, an officer of the Tool Company.

Before I go into that, let me suggest to your Honor that it has been stipulated that the Cook affidavit, of which we have been talking, which was filed [22] in Washington—that its filing was authorized by the Tool Company, no question about that, but it was not filed by itself. It was filed together with another affidavit by Mr. Holliday, and Mr. Holliday says, among other things, that the Cook affidavit describes all the events accurately which happened before a certain period of time, so that is the client himself.

Holliday is an officer, as your Honor by now knows, of the Tool Company.

And then it says that the Tool Company has acted on the advice of counsel to take steps which its counsel advised were required to protect its interests with respect to subsequent period of time.

Then it shows that Toolco, through its counsel—never mind, your Honor, what I talked about using counsel as businessman—through its counsel and upon his advice did a certain thing.

You have got to take these two affidavits together, as the Master did.

Now, I don't believe that there can be any question—I conclude, if I may, with that, your Honor—that the Master was right when he said, "I have ruled and told you what documents I consider as waived and what kind of documents were never published [23] at all," such as when a lawyer acts as negotiator, such as a lawyer learning facts from third parties, and the like.

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Now, "You submit those, produce them forthwith, and any documents as to which you have questions—submit them to me and I will rule."

We have cited pretty ancient and pretty recent authority to your Honor to show there is no doubt that he was right, that it is not the province of counsel to determine what is privileged, but that of the Court.

In one fairly recent case the Court appointed a Special Master for that very purpose if the parties couldn't agree to it.

Now, we have got here a Special Master so there can be no question about it. I don't think that I have to waste your Honor's time any more. I think it is so clear, A, that the appeal is untimely, and, B, that the Master was, if I may so, as right as rain, but I think I will cease and desist.

Mr. Sonnett: May I have several minutes, your Honor?

The Court: Certainly.

Mr. Sonnett: I think the point about the [24] appeal being not timely is far from having a technical point when your Honor considers—

The Court: I am going to go to the merits, Mr. Sonnett; forget about this question.

Mr. Sonnett: Yes, your Honor.

May I suggest while I normally wouldn't advocate a technical point, this particular matter of privilege was argued five times before the Master over a period of several months.

The matter has had very lengthy consideration, and while I do not suggest that your Honor should take a technical position, I think that the fact that it was argued five times and a very careful and learned opinion was written and that the Master extended the time to appeal and that the appeal was two weeks after the date and that the argument before your Honor was adjourned to today so Mr. Davis could be

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here, and he is not here, all of these, I think, being matters of record, should be considered in determining how much faith really there is on the part of Hughes Tool Company in this so-called appeal.

Now, I will be very brief. I think Mr. Kaminer's argument in brief covers the matter generally, [25] but there is one aspect in particular that I would like to emphasize.

Your Honor will find in the brief submitted by Mr. Kaminer a reference on page 22 to an affidavit of August 8, 1961, signed by Chester C. Davis, in which he stated—and I quote in part—"All of the acts alleged in the complaint to have been done in and after 1960 were done upon my advice as counsel for Toolco."

In the answer—I think it is in paragraph 40—the allegation is made:

"All of the acts alleged to have occurred since 1960 were done upon advice of counsel."

If your Honor will look in due course—I don't suggest taking the time now—at the allegations of the complaint, and in particular those relating to the year 1961, your Honor will find, among other things, that it is charged there that assertions were made as to legal positions during 1961, positions of Toolco, and that these related to, among other things, the position of Toolco, that it had the right to terminate the voting trust other than in accordance with its terms, and the like.

[26] Now, having asserted in sworn affidavits and in a formal pleading to this Court that every act we allege, including the taking of these positions, every act we allege as having occurred in 1960, was done upon the advice of counsel, we now find characteristically Mr. Davis is backing away from that, because if you look at his affidavit in sup-

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port of this appeal in paragraph 14 you find now a disclaimer.

It is said there that Toolco obviously did not intend to set up advice of counsel as a defense to a charge of antitrust violations.

If, however, the allegations in paragraph 40, that is, of the answer, are construed as asserting the defense of advice of counsel, with respect to the antitrust charges—which, incidentally, it does—Toolco requests that it be permitted to amend its answer so as to clearly state the defense which it intended to assert.

In other words, it now appears from the record that they do not take the position that any advice of counsel was or could be a defense to the second antitrust cause of action.

Your Honor will further find on page 8, paragraph 15 of the same Davis affidavit, now before [27] you, a further very interesting statement beginning at the bottom, 7:

“However, the letters identified as constituting willful and malicious interference were either written by counsel, or on oral advice of counsel, and no written communications exist with respect thereto.”

Now, this is very strange. We have an affidavit, we have an answer asserting that every act we allege as having been committed in 1960 was done on advice of counsel, but the closer you get to it, the more difficult it becomes to find any evidence of the advice.

Now, certainly, if this is artful pleading in the affidavit, if what is really being said is that there was advice on the subjects referred to in the written communications, we are clearly entitled to have that advice because the privilege, if any, has been waived both by the affidavit and the answer.

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If, in fact, there was any legal advice, well, let's not waste time in a further effort to conceal that fact. Let's know what we are doing; but I don't think that the Tool Company can have it both ways.

[28] They can't assert that there was legal advice and that that's the reason these acts occurred by way of concession and avoidance and now suggest that perhaps there wasn't any.

Perhaps counsel himself did this—perhaps—and maybe this is what they are suggesting—these weren't the acts of the Tool Company, but the assertions made were made in the name of the Tool Company.

Now, it just seems to me, your Honor, when you consider that you granted our motion to produce in December of last year, that the production was to have occurred in March, that we have been at this privilege problem five times before the Special Master, arguments ad nauseam, briefs ad nauseam, that the Special Master worked on this at great length. He issued a very careful opinion.

Only two of the conclusions he expressed are in any event raised by this so-called notice of appeal.

As your Honor will see from the small brief we submitted today, it seems to me that what we need is for the Court to dispose of this once and for all and let's get at the documents showing this advice, if, indeed, there are any, or let's establish that [29] there aren't any.

Thank you, your Honor,

The Court: Miss Lea.

Oh, I am sorry.

Mr. Barr: If your Honor please, my name is Barr from Cravath, Swaine & Moore. I don't want to say anything more about the legal problems involved. I think Mr. Kaminer covered them more than adequately.

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Your Honor, this problem has been in this lawsuit since the initial defendants first came into it. Since prior to 1960 the Tool Company has had a policy of conducting almost all of its business negotiations through three attorneys:

Mr. Raymond Cook, Mr. Gregson Bautzer and lately Mr. Chester Davis.

Now, all of those attorneys have at one time or another conferred, negotiated to bargain with my clients and with the clients of every other attorney in this room regarding the agreement or failure to agree about the subject matter of this lawsuit. These are the people who dealt on behalf of the Tool Company.

Now, the Special Master quite properly ruled that as to those negotiations, the bargaining, [30] the facts and circumstances and the documents are not privileged; there is no privilege involved there and those must be produced.

I take it the Tool Company doesn't now challenge that ruling of the Special Master, but those documents have not been produced, although they have been ordered to be produced by the Special Master.

Then, as to the question of waiver, your Honor, the Tool Company has followed since the beginning of this lawsuit a course of conduct of using the advice of counsel and the information of these attorneys as a sword against the additional defendants because all of these activities which the TWA charges in its complaint the Tool Company has done, they say, "No, our defense is that we didn't do it; the additional defendants did it."

So when they pleaded advice of counsel here and when they use the information that their counsel have gained acting as business advisers, they are using it against us.

Now, there are several other things. You have heard about the Cook affidavit and certainly that is the broadest kind of waiver I have ever seen.

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I think what it really was was a preliminary [31] draft of the counterclaims, because many of the paragraphs are absolutely identical with the counterclaims, and much of the other language is also, I think.

That affidavit was filed in another proceeding, it is true, and there has been a nice little record established down in Washington and the examiner has found, and it has been publicized throughout the country, that there was no evidence in that record of any wrongful conduct by Hughes with respect to TWA.

Now, in addition to that, Mr. Cook has announced to the Special Master many times off the record, and it is in the Special Master's opinion, that he will be a witness in this proceeding, and he is not appearing as counsel in this proceeding because he will be a witness.

You heard about the Holliday affidavit, which is also a very broad waiver. Section 40 of the answer, paragraph 40, is also a very broad waiver and again, your Honor, a sword against us.

And the Davis affidavit of August 8, 1961, and Mr. Holliday's affidavit of August 7, 1961, both of those say everything the Tool Company [32] did in and after 1960 they did on advice of counsel.

Now, the Special Master on that aspect, which is really the other part of his ruling here, said, "That on the basis of all of those things I find that there has been a waiver as to the matters contained in those affidavits and the answer," and so on.

Miss Lea has told you that there isn't any waiver in the Cook affidavit because it is all just facts. If that is so, I don't see what problem they have because the Special Master's ruling simply says whatever documents are covered in the subject matter discussed in these affidavits, and so on, must be produced.

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Now, he doesn't say Tool [Company] could drive them all over and produce everything immediately. He says, "If you have any problems with any of these documents, bring them to me and I'll rule on them. If you think a document is still privileged, bring it to me and I'll look at it and I will decide."

Further, he says, "If you think a document is not covered by the waiver, bring it to me and I will decide"—but the Tool Company simply refuses to do that.

[33] They come here and tell your Honor that they have been ordered to produce. What they have been ordered to do is produce the things as to which, A, they no longer claim the privilege; B, they no longer believe, or they now understand there has been a waiver, and as to the rest of the documents they are to bring them to the Special Master and show them to him.

Your Honor, Mr. Kaminer has included the order of the Special Master and the opinion in the order. I won't read it to you, but I would like to refer you to page 4388 to 4391, which contains his conclusions and order, and it is very clear from that—

The Court: I have read it.

Mr. Barr: Now, sir, on the basis of the considerable amount of work—and there are over 250 pages of oral argument before the Special Master on this subject—there must be another 250 pages of briefs and affidavits submitted to the Special Master on this subject—the Special Master has read a substantial number of the documents. The documents that he has not yet read he has asked that the Tool Company furnish to him so that he may read [34] them.

Moreover, he has said in his order, "If you have any problems about particular documents, bring them to me and I will rule on them individually," but instead we get this appeal.

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Your Honor, I submit, that the appeal is a complete waste of everybody's time.

What they ought to be doing is submitting to the Special Master the documents about which they still have a problem—and nobody knows what they are yet, whether there are any, or how many there are, how many of the documents they are still withholding they are ready to admit should be produced, but it has been two months now, Judge, almost since we have been in this case that we have been trying to get at the facts that these three lawyers, who are going to be the principal witnesses in this case, know about, and I believe we are entitled to have them, sir.

Thank you.

The Court: Miss Lea.

Miss Lea: I really hardly know where to begin in reply, your Honor. There has been so much said that first I really don't understand. I don't [35] know how it goes to the fairly simple issue which I tried to indicate at least we think is before your Honor, and to the extent I do understand, most of it is just plain wrong, a misstatement of the fact as well as law, I think.

The suggestion has been made, I think, that Toolco is somehow remiss in seeking to protect its rights by asking for a review before your Honor rather than producing documents either one by one and claiming the privilege with respect to them and then being confronted with the necessity of taking an appeal to review if we found it required under the circumstances from each document rather than trying to get the situation straightened out at the very beginning, get the whole question of privilege straightened out at this point, which is what we are trying to do.

It seems to me much more reasonable and certainly much more expedient, or expeditious to do it that way rather than to take time doing it in piecemeal fashion.

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During the course of the several arguments we have had a lot of stones thrown at us. I suppose we ought to be accustomed to that by now. We ought [36] to be trying to get it fixed at any rate and trying to pick up some of them and indicate what the situation really is.

I think each of the gentlemen who spoke said that Toolco did not make available to the Special Master, as I stated in my argument, all of the documents with respect to which it claimed privilege.

That just isn't so. Mr. Kaminer and Mr. Barr, I think, mentioned the documents reposing in the files of Mr. Bautzer. To the extent that those are not Toolco documents, to the extent that those documents belong to the various law firms and various individuals, a motion directed at Toolco does not require their production and they have not been produced.

I don't see that a party can be or is required to make available or to turn over, or, indeed, is capable of making available things which don't belong to it. To ask us to do it and then to castigate us for not doing it, it seems to me is sheer nonsense.

The remarks which have been made with respect to the general statements concerning the attachment of privilege which was made by the Special Master during the course of his opinion are general statements with [37] which Toolco is in general agreement. It is the application of some of those principles with which we quarrel.

We recognize them when an attorney acts in a non-legal capacity and communicates with his client matters relating to that non-legal capacity, matters which are not otherwise within the confidential relationship, that such matters are not privileged. We understand that. We always have.

The question, however, whether any particular individual at any particular time was acting as a negotiator and solely

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as a negotiator and not acting in any manner as attorney with respect to which the privilege would attach is again a question of fact, and Mr. Barr got up and made what he claimed were some statements of fact. If he intends to testify on the subject, that is all very well and good, but let's make sure that what he is doing is testifying as to facts which he claims that he knows and let's do so at the proper time and in the proper place.

Mr. Barr's statements, with all deference to Mr. Barr and the great respect I have for him, are not facts upon which a finding of waiver can be based on the state of this record.

[38] Mr. Kaminer made some comments about waiving the privilege when you offer the testimony of the attorney in evidence, or where you put the attorney on the stand to testify with respect to certain facts.

First of all, with respect to a matter of who is going to be a witness, I do not recall that the Tool Company has ever said that it would call any of its attorneys as witnesses. My understanding of the situation is that there have been occasions that others may be required to call them in and that they may appear as witnesses for that reason. I am not absolutely certain about that. I may be in error.

In any event, it doesn't really make very much difference because until the time that they get on the stand, until the time that they relate or disclose privileged communications, there isn't any waiver. What may happen tomorrow or next week or next month is no basis for saying that today you have waived a privilege which existed up until today because some time you may do something different.

Well, let's wait until something different happens. At that point it may be appropriate to find that a waiver has occurred. It certainly isn't [39] so now.

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There were also statements made with respect to Mr. Cook's having stated that he was counsel for Tool Company during a certain period. Learning facts as counsel and learning facts from the client in the form of privileged communications, or confidential communications to which the privilege attaches, are two very different things. The fact that Mr. Cook may have been acting as counsel and may have been told by Mr. Zilch something which affects his activities as counsel does not mean that if he discloses what was told to him by someone unconnected with the client that just because he happens to be the attorney in that instance he has waived the privilege. It is only the communication from the client to the attorney, or conversely, which the privilege affects. Those are not matters which on the face of the Cook affidavit are being disclosed here.

I just don't understand the arguments of counsel in so far as they tend to indicate otherwise. I think your Honor, when he reads the Cook affidavit, will be able to determine that in so doing.

Mr. Kaminer: Your Honor—

Mr. Barr: If your Honor please,—

[40] The Court: I have heard enough.

Mr. Kaminer: May I point one thing out?

I won't repeat a word I said, but I would like your Honor to look at page 4385 of the Special Master's ruling. That is in the binder, sir. I can hand you up another copy. We have it all here.

The Court: You have it here. I have a copy here, have I not?

Mr. Giddings: It is in the square binder, your Honor. Here it is.

The Court: 43—what?

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Mr. Kaminer: —85, sir.

Your Honor has just been told that, of course, they haven't produced anything in the hands of outside counsel because they don't have to. Now, here is a ruling by the Special Master which says—has your Honor found it?

The Court: Go ahead.

Mr. Kaminer: (Reading):

"An additional question is raised as to whether the motions of the parties in this proceeding under Rule 34 which have been sustained include documents in the hands of the parties outside counsel. The records, [41] memoranda, writings and similar documents are described in the motions as those in the possession, custody or control of Hughes Tool Company."

I leave out the parenthesis.

Maybe I should read it:

"Toolco hereinafter referred to as Hughes Tool Company and any concern or persons associated at any time with Hughes Tool Company, including its sole stockholder. It would appear that such documents and writings in the hands of outside counsel of Tool Company while not in the Tool Company's possession or custody would be within its control"—

and then he cites various cases.

Now, we are told that these papers have not been produced. I haven't even heard this argued, and there it is in black and white, that they have to be and there is an order that they have to be.

The other thing I want to say is about the Cook affidavit, but I think there I best rest on what has been said because your Honor says you have heard enough.

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The Court: All right. The only comment I [42] have is that nobody, including the Special Master, cited In re Colton written by Judge Metzner on this problem about six months ago. It is on appeal now before the Court of Appeals.

Mr. Kaminer: Your Honor, we hadn't found it. We certainly would have.

The Court: I said that facetiously. I will write to the Special Master and tell him.

Mr. Kaminer: Has the case been published yet, sir?

The Court: It is in the advance sheets. It is on appeal, though. It was argued. It has been pending now for over a month.

**Transcript of Proceedings Before Special Master
J. Lee Rankin, June 4, 1962**

[Doc. 218]

[CAPTION]

61 Civ. 2324

[APPEARANCES]

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[4472] The Special Master: I will overrule the motion to strike the answer of Mr. Holliday. I further order and direct that unless Mr. Hughes authorizes his counsel or some other person in writing, in form satisfactory to counsel for TWA and the Special Master, to accept service of a subpoena to appear for the taking of his deposition on or after July 1, 1962, at [4473] such time as it may properly be reached under the orders of the Court, by June 20, 1962, that Hughes Tool Company answer the interrogatories as presented, except as modified by the statements of Mr. Sonnett this morning.

I did not direct that Mr. Holliday personally have to answer the interrogatories, because I interpret the interrogatories as reaching such information as Mr. Holliday has.

Mr. Barr: If this matter is concluded—

The Special Master: I want to make it clear on this record that where I provide that the order will not require the answering of the interrogatories if Mr. Hughes authorizes the acceptance of a subpoena, it is only a subpoena for his appearance for the depositions, and I am not requiring that he authorize the service of process in this case upon himself. I want to make that clear in the record.

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**TWA's Notice of Motion and Affidavit,
June 25, 1962**

[Doc. 305]

[CAPTION]

61 Civ. 2324

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of John F. Sonnett and all prior proceedings herein, the undersigned will move before Hon. J. Lee Rankin, Special Master on the 2d day of July, 1962 at 10:00 A.M. or as soon thereafter as counsel can be heard,

(a) For an order pursuant to Rule 30 (d) of the Federal Rules of Civil Procedure terminating the deposition of plaintiff Trans World Airlines, Inc. by its President, Charles C. Tillinghast, Jr. as of July 2, 1962; and

(b) For a further order determining that Rule 4 of the Civil Rules of the United States District Court for the Southern District of New York, effective July 1, 1962 is applicable in the instant case; and

(c) For a further order directing that counsel for all parties shall meet and come to agreement upon the schedule of depositions under said Rule 4 and that should counsel fail to agree on such schedule then

A-2235

TWA's Notice of Motion, June 25, 1962

the Special Master, on July 12, 1962 will determine the order of depositions that will be followed.

Dated: New York, New York
June 25, 1962

Yours, etc.,

CAHILL, GORDON, REINDEL & OHL
Attorneys for Plaintiff
Office & P. O. Address:
80 Pine Street
New York 5, New York

To:

CHESTER C. DAVIS, Esq.
Counsel for Defendants
Office & P. O. Address
120 Broadway
New York, New York

cc: All Parties

Affidavit of John F. Sonnett, June 25, 1962

[CAPTION]

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

JOHN F. SONNETT, being duly sworn, deposes and says:

1. I am a partner of Cahill, Gordon, Reindel & Ohl, Attorneys for plaintiff Trans World Airlines, Inc. ("TWA") and I am familiar with the matters hereinafter set forth.

2. This affidavit is submitted in support of a motion by plaintiff TWA for an order terminating the deposition of TWA by its President, Charles C. Tillinghast, Jr., as of July 2, 1962. In addition, I submit this affidavit in support of plaintiff's motion that the Special Master determine that Rule 4 of the Civil Rules of the United States District Court for the Southern District of New York, effective July 1, 1962, is applicable to the instant case and for an order directing counsel for the parties to agree upon a schedule for the taking of depositions and providing that, failing such agreement, the Special Master will make such determination.

3. The defendant, Hughes Tool Company ("Toolco") commenced taking the deposition of the plaintiff, TWA by Charles C. Tillinghast, Jr. on January 5, 1962. Since that time, the parties have convened for the purpose of taking depositions or for oral argument a total of 27 times and Mr. Tillinghast has been on the witness stand for 17 days.

4. It is clear that the defendants have already had this witness under examination for a sufficient period of time to

Affidavit of John F. Sonnett, June 25, 1962

gain complete discovery of any relevant information in his possession. However, in addition to the 17 days previously completed, the defendants will have had four more days to question this witness before the return date of this motion to terminate his deposition. If their true purpose is a discovery of the facts, they will have ample opportunity in the next few days to complete their examination into this witness' knowledge. However, I feel constrained to state that up to now the defendants have shown no inclination to complete the deposition of Mr. Tillinghast. Indeed, quite the opposite has been the case. They have consistently used every procedural device available to protract the length of time Mr. Tillinghast must spend on the witness stand. A continuation of these tactics will constitute an unreasonable burden upon both the deponent and the plaintiff while a termination of the deposition will in no way prejudice the rights of the defendants to any discovery of fact useful to the preparation of their case.

5. As to the second branch of plaintiff's motion, it is submitted that the language of Rule 4 clearly indicates that it was promulgated to deal with precisely the situation found in the instant case. The Federal Rules of Civil Procedure require the plaintiff to obtain leave of court before allowing it to file notices of taking depositions where the plaintiff seeks to file such notices within twenty days after the commencement of the action. No such limitation is placed upon the defendant. This has led to the former practice in this district of granting complete priority of discovery to the defendant. In complex litigations a financially strong defendant has thus been allowed to protract his discovery procedures to the point where in some cases years

Affidavit of John F. Sonnett, June 25, 1962

might pass before the plaintiff would have an opportunity to develop his case.

6. It was to mitigate this often difficult problem that new Rule 4 was promulgated. Effective July 1, 1962, it provides that "... neither the service of a notice to take the deposition upon oral examination of party or witness, nor the pendency of any such deposition, shall prevent another party ... from noticing or taking the deposition upon oral examination of party or witness concurrently ... " (Emphasis supplied). Depositions noticed by counsel for defendants are pending in the instant action, so many of them, indeed, that to judge by the time which defendants have spent so far in taking a single deposition, it is reasonable to expect that there will be such depositions pending or being taken for a long time to come. Under Rule 4, however, TWA is not thereby prevented from "noticing or taking" depositions concurrently. The language of the rule itself, with its emphasis upon pendency, makes it clear that from and after its effective date its provisions are available to litigants in actions already in progress. This is consistent with the general rule that changes in procedural or remedial law are immediately applicable to existing actions or causes of action, and not merely to those which arise in the future. See *Dargel v. Henderson*, 200 F.2d 564, 566 (Emergency Court of Appeals, 1952), and cases cited; *Untersinger v. United States*, 181 F.2d 953 (2d Cir. 1950). A number of cases to the same effect (and none *contra*) are collected in 46 *Modern Federal Practice Digest*, under the "Statutes, Reg. Number 267(2)", the heading of which is "Statutes relating to remedies and procedure—Application to pending actions and proceedings."

Affidavit of John F. Sonnett, June 25, 1962

7. The only limitation to be found in the language of Rule 4 is "unless otherwise ordered by the court for good cause shown." It is submitted that in the instant case good cause can be shown for the applicability of the new procedure, and not for its suspension. The former priority practice in this litigation has been a weapon for obstructing its progress. It should be recalled that the defendants had originally scheduled the depositions of four TWA officers to be taken in one week. Now, while the entire litigation has stalled on the taking of a single deposition, numerous other persons who have facts in their possession of paramount significance to the issues herein cannot be called to the witness stand. Apart from the ever present risk of death or some other event which may make such a witness unavailable, the mere passage of time necessarily and inevitably will dim his recollection. The purpose of discovery is to establish facts on which the parties—all of them—can build their cases. If the plaintiff's motions are denied and the delaying tactics of the defendants are allowed to continue, I submit that the plaintiff will be deprived of its substantial rights.

8. I, therefore, respectfully request that the Special Master grant the motions of the plaintiff.

JOHN F. SONNETT

[Jurat omitted]

Affidavit of John R. Hupper, July 2, 1962

[26781]

[CAPTION]

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOHN R. HUPPER, being duly sworn, deposes and says:

1. I am an attorney-at-law and a member of the firm of Cravath, Swaine & Moore, attorneys for the additional defendants The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr., and Harry C. Hagerty. I am familiar with all the prior proceedings herein since the date of joinder of said additional defendants.

2. I make this affidavit in support of a motion originally made by plaintiff Trans World Airlines, Inc. (TWA) and in which the above-named additional defendants now join, for an order by the Special Master that Rule 4 of the Civil Rules of the United States District Court of the [26782] Southern District of New York, effective July 1, 1962, is applicable to the instant case. I am not concerned with the termination or continuation of the examination of Mr. Tillinghast or that of any other particular witness. I am concerned with the substantial period of time which separates us from the examination of witnesses crucial to our defense and I am very concerned that when our time to examine eventually arrives the witnesses may not be able to testify.

Affidavit of John R. Hupper, July 2, 1962

3. Accordingly, I believe that it is vital to the protection of the rights of the additional defendants that discovery proceedings be expedited. By order of February 7, 1962, Judge Charles M. Metzner set forth a schedule of depositions entitling Hughes Tool Company (Toolco) to depose 24 separate individuals in a time period that was to terminate at the end of April. We have now been operating under that order for more than four months and the examination of the first witness is not yet completed. In addition, plaintiff is presently entitled under that order to examine 7 additional individuals. I need not speculate about the substantial period of time which will be required to complete those depositions, under the present schedule. Nevertheless, the additional defendants are not entitled to commence their examinations until those 31 have been completed. I think it is fair to say that the time necessary for completion of those depositions must, under almost any schedule, be measured in years. I do not believe that Judge Metzner contemplated any such prolonged proceeding.

4. It is obvious that the passage of time dims recollection, especially of facts of the magnitude and complexity of those presented by the pleadings in this case. Of more importance, however, is what appears to be a real [26783] possibility that at least two vital witnesses should be examined with some promptness if their testimony is to be perpetuated.

5. It is a matter of general knowledge as well as a matter frequently apparent in these proceedings that Mr. Howard Hughes is difficult to find and that his present whereabouts are unknown. For example, Raymond M. Holliday testified on April 9, 1962, in the *Toolco-Northeast Control*

Affidavit of John R. Hupper, July 2, 1962

case (CAB Docket No. 11620) that he had not communicated with Mr. Hughes since October, 1961, and then he had only received a telephone message. (TR. 794-796). Mr. Hughes' testimony is of great importance to the defense of the additional defendants. I have, therefore, been disturbed by the recurrence of rumors and statements in the public press that Mr. Hughes' hearing and general health are deteriorating. (See, *e.g.*, The Wall Street Journal, April 23, 1962, page 1, Newsweek Magazine, May 21, 1962, page 73, The New York Daily Mirror, May 30, 1962, page 10, and The New York Times, June 24, 1962, Section 3, page 1-R). The Wall Street Journal on April 23, 1962, stated that one of the theories advanced for Mr. Hughes' increasing reluctance to appear in public "is that his health is not too vigorous". In a column by Walter Winchell in The New York Daily Mirror on May 30, 1962, the following appeared:

"Memos of a Fugitive from Broadway: Billionaire Howard Hughes ill? Or is it the trouble caused by enemies? (He's down to 125 lbs. Looks like a ghost)"

I cannot, of course, state whether such information is accurate. It is, however, a major concern to me that the most important witness in this case may be unavailable at whatever time in the future the present schedule may permit counsel [26784] for the additional defendants to take depositions.

6. Another witness whose availability seems problematic is Noah Dietrich. I am informed that Mr. Dietrich is now about 73 years old and that he was from 1925

Affidavit of John R. Hupper, July 2, 1962

through 1957 Mr. Hughes' chief adviser. An example, of the importance of Mr. Dietrich's testimony is the following excerpt from Fortune Magazine of January, 1959 at page 82:

" . . . Dietrich asserts that he did not appreciate how deeply Hughes was committing the tool company's assets until one day in early 1956 he added up the orders for aircraft on which Hughes had obligated the tool company and discovered that they exceeded Hughes's assets.

"The aggregate value of the orders came, as previously noted, to nearly \$500 million. Dietrich had known, in a general way, that Hughes was negotiating with a number of aircraft companies for new equipment; Hughes had discussed with him, during their desultory telephone exchanges, the difficulties he was encountering in deciding among the planes that were available. But numbers and costs had never been precisely mentioned. Hughes appears to have settled on the numbers himself, in independent consultation with T. W. A.'s chief engineer, Robert Rummel. The orders were placed with the manufacturers, the tool company was instructed to draw up the necessary contracts, and its lawyer bundled up the commitments and sent them on to Dietrich, who was then occupying the office on Romaine Street, so that he could present them in due course to the tool company's board of directors for ratification.

"It is impossible for an outsider to determine the merits of the situation that thereafter developed, particularly since Hughes has declined to discuss his affairs. Dietrich says he warned Hughes that he

Affidavit of John R. Hupper, July 2, 1962

was becoming dangerously overextended, and that the only safe way out was to set about arranging for \$300 million worth of long-term financing, either in the form of an offering of T. W. A. bonds, to be guaranteed by the tool company, or a combination of T. W. A. stock and tool-company debentures. Dietrich discussed such a project with the Wall Street house of Merrill Lynch and found that firm willing to undertake the marketing. Hughes brushed the idea aside. . . ."

7. Should either of the above gentlemen become unavailable for any reason, it would seriously and irreparably prejudice the rights of the additional defendants. [26785] That is particularly so since, as Toolco's counsel so frequently asserts, Mr. Hughes did not keep files. Thus, the only evidence available on many issues will be the testimony of Messrs. Hughes and Dietrich.

I believe, therefore, that it is imperative that the additional defendants be permitted to undertake at least some examinations in the reasonably near future. Accordingly, I submit that a sound exercise of discretion by the Special Master dictates the application of the principles embodied in Rule 4 to these proceedings.

(Sworn to by John R. Hupper on July 2, 1962.)

Transcript of Pretrial Hearing, July 12, 1962

[Doc. 107]

[CAPTION]

61-Civ. 2324

Before: Hon. CHARLES M. METZNER, District Judge.
New York, July 12, 1962, 10:30 a.m.

[APPEARANCES]

. . .

[2] The Court: I have here a notice of motion by the defendant Hughes Tool Company to review the rulings of the Special Master regarding interrogatories. In conjunction with those papers I have some correspondence from Mr. Davis, the attorney for Hughes Tool Company, to the Master dated June 11 and the answer of the Master dated June 14, and a letter from the plaintiff, TWA, dated June 22.

Since I have read the moving papers I suggest Mr. Sonnett start off and then Mr. Davis can answer. This is on the motion regarding interrogatories.

Mr. Sonnett: I think the record before the Court probably is sufficient for decision of the question without any extended argument. In terms of the cases cited by Hughes Tool Company I think the letter of the Special Master distinguishes those very effectively and the Court has that letter.

The Court: You rely on him as counsel to you?

Mr. Sonnett: To the Court and all parties and except in respect of the second matter before the Court today where we differ with his conclusions, I think that on the

Transcript of Pretrial Hearing, July 12, 1962

matter of the interrogatories regarding the location of Mr. Hughes, the Master has exercised very sound discretion. I think there is no showing of [3] burden by Hughes Tool Company that is of any consequence and I think that without the interrogatories—

The Court: I am frankly bothered not by the question of calling upon the defendant to answer these interrogatories while it is conducting the deposition of the plaintiff, but of the scope of the interrogatories. I have just received your brief which is on time because today was your time for filing it and I haven't had a chance to read it. I wonder did you discuss the scope?

Mr. Sonnett: Yes, we have.

The Court: Why don't you tell me something about it?

Mr. Sonnett: The only interrogatory which I think presented a problem on reflection was the interrogatory which I think is No. 7 and we discussed that at the bottom of page 18, beginning at the bottom of page 18 of the memorandum that we served and filed today and your Honor will note that we agreed before the Special Master to amend that interrogatory so as to eliminate what did seem to us on reflection to present a real burden problem.

We did it by inserting the underscored language which appears in the interrogatory as now stated at [4] page 19 of our brief.

The Court: The defendant says some of the people you requested aren't in their employ or are merely consultants. What about that? They certainly can't answer interrogatories as a party as to somebody who may not be in their employ.

Mr. Sonnett: Yes, and I would agree. The difficulty, of course, is the nature of the relationship between some of

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these people and Hughes Tool and Hughes is really known only to the people involved and to the Hughes Tool Company and Mr. Hughes.

The Court: You think you are also entitled to consultants?

Mr. Sonnett: No, I do not.

The Court: Whom I assume are independent contractors.

Mr. Sonnett: I do not know and would not so urge if their representation to the Court is those people are consultants, I suppose I am bound by that at this time.

The Court: Now, let us take the \$64 question, how can you ask Hughes Tool Company about the whereabouts of Mr. Hughes?

[5] Mr. Sonnett: I think it is proper discovery under Rule 26 and Rule 33 on interrogatories because it relates to the identity and location of a witness, indeed the single most important witness in the entire controversy. If they know I see no reason why they shouldn't supply the answer. I think it is precisely that kind of discovery that that portion of the rule contemplates.

The Court: You are speaking now of Hughes, not as a co-defendant but as a witness either for or against the defendant Hughes Tool Company?

Mr. Sonnett: Yes, your Honor, and I might add while he is named as a defendant, of course we haven't been able as yet to serve him and he hasn't voluntarily appeared and he is a defendant in name only.

The Court: I will hear Mr. Davis.

Mr. Davis: If your Honor please, the vice in the interrogatories which have been served is that it is not seeking information of the tool company. What it does, if you look at Interrogatory No. 1, is to state whether any officer, di-

Transcript of Pretrial Hearing, July 12, 1962

rector or attorney of the tool company has any knowledge, information or belief. Now that necessarily requires the tool [6] company, if it is going to answer these interrogatories, to in effect carry on some oral deposition of the officers, directors or attorneys.

It requires a further problem, a development by counsel for the Tool company as to whether this knowledge, information or belief is something which has been acquired by these officers, directors or attorneys in connection with their duties or functions as officers, directors or attorneys for the Tool company or in connection with some other capacity, particularly true in the case of attorneys.

We all know that undoubtedly it is true that counsel for the tool company may also have been or is counsel for Mr. Hughes individually and what we intended to raise with the Special Master and urge upon the Court here is that it is not merely the burden of answering the interrogatories addressed to the tool company, does the tool company know something, but this, in order to answer these properly would require the tool company to engage in an investigation of its officers and employees.

The Court: That is true of any inventory which a corporation has to answer. They have to ask the officers and directors and employees what the [7] answers are in order to furnish the answer.

Mr. Davis: May I point out normally the question relates to the affairs of the corporation and therefore normally a corporation knows it has records, it knows where to go and who to ask. It can be bound by an answer because the interrogatory relates to its business, to its affairs, it relates to something the corporation has done and it is a reasonable burden, I submit, in those situations for the

Transcript of Pretrial Hearing, July 12, 1962

corporation to answer the question with respect to what it has done, as to what business activities it has engaged in.

The vice here is this is not that kind of interrogatory. When we deal with attorneys, of course,—No. 7 and 4 also—4 relates to individual people, whom we point out are not employees of the tool company, who may have been at one time, and others are only outside consultants. An attorney, obviously, falls into neither category or both. He certainly is an independent person and what knowledge or belief he may have—what I think counsel have been doing is confusing, if I may use that word, the use of the interrogatory and the use of the oral depositions under 26.

[8] I respectfully submit that when the time comes, when it is proper for TWA to take a deposition of the tool company, at that time they may ask questions of whoever it wants to of the tool company and discover who has knowledge and information and satisfy themselves about whatever relationship and inquire however they want to inquire into any knowledge or information or belief which they may have. They do intend to take the depositions of the tool company. At that time we will have no objection to their making that kind of inquiry.

The Special Master, we respectfully submit, appears to have been moved in a desire to insure that TWA, when it comes their turn to discover facts, will have an opportunity to inquire of Mr. Hughes and he believes that and I think places a great deal of reliance upon the statements made by counsel for TWA—I am sure accurate statements as far as counsel for TWA knows them. Whether or not the facts or statements are accurate is another question, of course.

I note that in this brief they filed an appendix, a summary of various statements. Presumably TWA has taken the

Transcript of Pretrial Hearing, July 12, 1962

position that Mr. Hughes is available to them only as a witness unrelated to the tool [9] company and therefore must be served as a witness. Presumably Mr. Hughes is not a resident of the State of New York and counsel well knows, therefore, not subject to the service of process of this Court in this action. They are taking the position that they need to know where Mr. Hughes is in order to serve him with process is what the papers say, presumably serving him as a witness rather than some other kind of process and some other kind of action. I don't know whether the discovery rules are intended to cover that kind of situation really.

The Court: I think it is obvious Mr. Hughes is in a peculiar situation. He is obviously ducking service in this lawsuit.

Mr. Davis: I have a feeling, your Honor, that a great deal of showmanship has been displayed in connection with where is Mr. Hughes. That when the time comes for taking the deposition of the tool company the position of TWA counsel is Mr. Hughes as a former president of the tool company or as a one hundred per cent stockholder of the tool company or some other reason, is required to be produced by the tool company as its managing agent or on some other theory. I would be very much surprised if that isn't what they [10] do really. But nevertheless the question is raised, this important need at this time to be able to serve Mr. Hughes and for Mr. Hughes as an individual, who, after all, does have some individual rights even though he may be a one hundred per cent stockholder of the tool company, they would like to have these interrogatories served. I think the interrogatories have been deliberately framed that way. They don't ask what the tool

Transcript of Pretrial Hearing, July 12, 1962

company knows and lets the tool company assume the normal responsibility of any corporate defendant in answering the question. They want the tool company to go out and get the knowledge, information and belief of anyone at one time or another that may lead to the service of Mr. Hughes. Look at Interrogatory No. 7.

I don't know what business it is of the tool company as a corporate defendant to go around and find out the knowledge or information of employees who also happen to be personal friends or had rendered personal service to its stockholder. We are supposed to go out and make an inquiry as to what knowledge, information and belief they have. We submit the interrogatories are too broad and improper.

The Court: Mr. Sonnett, on what basis do you demand an interrogatory of the corporate defendant [11] as to whether an attorney employed by it has any knowledge, information or belief?

Mr. Sonnett: The information in the possession of the attorney is under the control of the client necessarily since it is information—

The Court: Under Hickman and Taylor?

Mr. Sonnett: I think information as to the identity or location of a witness which the lawyer has and he has by reason of the fact that he is lawyer for a corporate defendant.

The Court: He may not have it by that reason. He may have it by reason of the fact that he also represents Mr. Hughes personally.

Mr. Sonnett: We don't have that situation. If we did, I would have felt differently. The record is abundantly clear and if there is any doubt I will ask if there is anybody representing Mr. Hughes personally.

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The Court: The gentleman from Texas attended some conferences with me whom I am sure represented Mr. Hughes personally.

Mr. Sonnett: He disclaimed that.

The Court: In this lawsuit he may disclaim it, but that doesn't mean he didn't represent him personally [12] in other matters.

Mr. Sonnett: That has not been asserted, your Honor.

The Court: I think that is what you are up against really, aren't you? Mr. Davis, are you an attorney for Mr. Hughes personally?

Mr. Davis: Yes, sir, I have given advice to Mr. Hughes personally. I do not represent him in this action and I have not been authorized to represent him in this action.

The Court: All right. Go on to the next problem that bothers me. Your No. 7 you ask whether any tool company employees, agents and/or representatives who during the year preceding the date hereof have performed services of a personal nature or otherwise directly for Mr. Hughes. How do you sustain that?

You are not asking whether they have done it in relation to the corporate defendant, you are asking the corporation to go and ask their officers, agents and employees whether they did anything personally for Mr. Hughes outside the corporate activities.

Mr. Sonnett: I thought our amendment eliminated the problem which otherwise would exist because we inserted language appearing at page 19 [13] of our memorandum, we inserted the language, "To the knowledge of any of tool company directors or officers."

For example, if tool company's directors or officers know that one of tool company's chauffeurs has been driving a

Transcript of Pretrial Hearing, July 12, 1962

tool company car to and from a particular address where Mr. Hughes has been staying or is staying or is suspected to stay very shortly, it seems to me that information is not privileged, relating to the identity or location of a witness and they should be required to supply it.

To avoid the problem they would have to go and conduct an investigation as to whether or not any of their employees did personal work for Hughes, we inserted that language which I think takes care of the problem.

The Court: Supposing a director of Hughes Tool Company has done personal work for Mr. Hughes unconnected with the tool company. Do you say by virtue of being a director of the tool company you can ask the tool company this interrogatory to find out from a director what his personal relationships with Mr. Hughes have been?

Mr. Sonnett: Only in respect of the location of Mr. Hughes.

[14] The Court: Let us go on to the next motion.

In this motion the reverse is true. I have read your papers, Mr. Sonnett, and haven't read Mr. Davis's. They have been filed on time but also only this morning pursuant to the direction of the Court, so I suggest Mr. Davis start off.

Mr. Sonnett: Yes, your Honor. I don't want to extend the prior matter but may I say in answer to your prior question certainly if a director of the tool company were on the stand I could ask him where is Mr. Hughes. He would have to tell me no matter how he acquired the information.

The Court: All right, Mr. Davis, application by plaintiff pursuant to Rule 4 of this Court adopted July 1st.

Mr. Davis: Your Honor, I appreciate the fact that since my brief was only filed this morning, this gives me an op-

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portunity of describing our position. Peculiarly enough, however, I am a little bit at a loss to understand just exactly what it is that counsel for TWA is seeking to review here. There is no question and no one ever argued and certainly the tool company never argued that the rules of the court which became effective July 1 in 1962, including Rule 4, applies [15] to pending actions. The issue, as I understand, was whether this Rule 4 which became effective July 1 set aside all prior decisions and orders of this Court with respect to the conduct of discovery not only in connection with this case but all cases.

We have annexed to our brief an Appendix A, Mr. Rankin's decisions and the reasons he gave in support of the decision, and if your Honor is not familiar with that I would suggest that—

The Court: I have read it. That is in the moving brief, too, as I recall.

Mr. Davis: I don't know, sir.

The Court: Appendix B of the brief in support of the movant's position, that is the order of the Special Master on July 2, 1962.

Mr. Davis: I will not take the time in reviewing that. The position of the tool company is that the decision of the Special Master should be affirmed for the following reasons:

First, that the Court in this particular case has already carefully considered on more than one occasion the manner in which the discovery proceedings were to be conducted and had entered several orders in that regard. Rule 4 by its very terms applies only in cases where [16] there are no court orders.

Our second position is that as a matter of law the adoption of the court rules, procedural rules, while applicable

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to pending actions do not have the effect of setting aside and reversing or modifying or altering prior decisions.

The Court: I think you ought to discuss whether I should exercise my discretion. It is clear in my mind that I have the power. You should only argue the question of whether I should exercise my discretion in granting the plaintiff alternate dates for depositions.

Mr. Davis: I will address myself to that, then. When the new Federal Rules were adopted in 1938 they were construed as to permit a plaintiff to commence an action against a defendant and in effect merely put him on notice that they had a cause of action and eliminated the requirement of specificity in pleadings, the pleading of facts. And the answer given by the Court when defendants complained that this liberal construction was permissible by plaintiff was you will be able to discover the facts in discovery proceedings. It is true that in most cases, certainly in a complaint which charges violation of the antitrust laws and even in a case where there is nothing more than that, a defendant [17] has some idea as to what it is all about. He knows how he has been conducting his business and if there is any indication at all in the complaint of the area of the alleged wrongful activity, a defendant is able, if he really wants to, to defend himself, and when I speak of defending himself I am always including preparing himself before his deposition is taken, before he is asked to testify.

We have an unusual situation here which I have tried to highlight by an appendix which I incorporated in my brief which relates to the CAB orders. This is a situation where we have the specific provisions of the Aviation Act, that the antitrust laws are not applicable. We know as a fact, as a matter of record, that every transaction between the

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tool company and TWA involving more than \$200 per transaction or \$10,000 in one year was specifically reviewed and approved by the CAB. The acquisition of the stock interest of the tool company in TWA was approved by the CAB. In the 1950 further control case which specifically authorized the tool company to increase its holdings in TWA from what was then somewhat below 50 up to 78 per cent, the CAB approved and I have referred to it in my papers, the language used by the Commission, recognizing that in [18] so doing it was permitting the tool company to be in such a position of control as to dominate the policies followed by TWA.

Now I submit, your Honor, that under those circumstances the defendant is entitled to find out what it is that the plaintiff is complaining of before he should be required to be deposed. That basically was the argument that we had before Judge Murphy and Judge Herlands. TWA would say no, we had a special circumstance.

The Court: I understand that now you have been going forward for several months before the Master, who as I understand, was sitting from ten to four, two or three days a week, and it would seem to me by now you ought to know what it is all about.

Mr. Davis: No, your Honor, that is not quite the situation if I may put it that way. It is true we have been seeking to take the deposition of TWA since last August and it is true that it commenced January.

The Court: You started with the Special Master.

Mr. Davis: But there has been starting with the Special Master only 17 days of examination of Mr. [19] Tillinghast, 17 days, that is all we had.

The Court: How much more do you want?

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Mr. Davis: You ought to look at the 17 days and find out what we have been through in order to try to obtain the facts, what we have covered so far, and that is really revealing. This complaint, as you will recall, while it is primarily based, judicially based on alleged violation of the antitrust laws, there is an allegation that the tool company wilfully and maliciously interfered with the business of TWA apart from the fact that it owned 70 per cent of TWA. That is something alleged to have taken place during the period of 1961, Mr. Tillinghast was the chief executive officer. That is what Mr. Tillinghast was testifying about, and I daresay it is quite revealing to find out the concepts that he used to contend what constituted an alleged malicious interference with the affairs of TWA, the letters, communications that were written by the tool company addressed to TWA, some were addressed to directors and some were to lending institutions.

It was during 1961 that this so-called additional Boeing financing took place. Now, interestingly enough, it was Mr. Tillinghast who decided to commence this action to be sure upon the [20] advice of counsel or others.

It has been my experience that the most fruitful place to discover the facts, the basic facts, is to find the man who presumably has been told everything. I expected Mr. Tillinghast to be in a position, when I covered the portion of the complaint relating to the alleged violation of the antitrust laws, having been the person who made the decision to start the action, to be able to say yes, this we contend, that at such and such a time the tool company did this, that and the other. I don't have any personal knowledge and this is what they claim took place. Where a better place to go than the chief executive officer, the person who presumably received all the reports.

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Now, there is no question the Special Master has been sitting on top of these depositions, seeing to it that the time was not wasted and seeing that we pushed along. We have been handicapped to some extent in obtaining documents. I don't start the colloquies but it may take time in answering them. There is no question in my mind Mr. Tillinghast had a conference with Mr. Thomas last May who was the prior president of TWA and presumably the chief executive during the height of this so-called misconduct.

[21] I would ask him what did Mr. Thomas tell you, what inquiries did you make when he was chief executive officer. He did not inquire into that. Any particular reason for not doing that? Yes.

What was it? I was afraid if I asked questions and I got information you would get it out of me. This is in the record. I am not quoting the exact words, but that is the essence of what he said. If the chief executive officer does not want to disclose the facts underlying the complaint, we will have to get it some other way and it takes a little more time, but that doesn't affect the fundamental right that we have to discover in some way or other what it is that TWA is contending before we are required to be subjected to oral deposition in defense of ourselves.

Your Honor by your prior decision has already given in effect concurrent discovery when you required us to produce the documents. We did. You have limited the scope of the discovery that we may engage in and certainly they can't say that they have been expecting to find out from us what it is they are complaining about. They may want to find out what our defenses are but it seems to me before we should [22] be required to go into this area we

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ought to have some kind of specifics, something we can address ourselves to. I will go beyond that and, as I indicated in the brief, and I am quite serious, I know it is a hard thing to do, but in the light of the situation of the CAB in the northeast control case where they reviewed the matter as well as the relationship between the tool company and TWA, we expected to be in a position to dispose of this action. But difficult as it is, when we get the facts as your Honor indicated, warned me the first time, you suggested that your inclination would be to give everybody a full discovery.

The Court: Not my inclination, the Court of Appeals of the Second Circuit's inclination.

Mr. Davis: That may be, but every case has a different situation. We have an unusual situation here. Without going into the primary jurisdiction basis of the complaint, you have a very well-drawn complaint but admissions are admissions and once I get some basis, get this thing nailed down as to what it is that they are talking about, I have no hesitation in submitting that I will be in a position and I submit successfully even before the Second Circuit of [23] dismissing this cause of action on the primary jurisdiction if nothing else.

The Court: Not if you have Judge Clark on the bench.

Mr. Davis: Your Honor, I believe that the provisions of the Federal Aviation Act are quite specific, not quite the same at all, and the determination of the CAB, as you will see in our memorandum, is rather impressive, the number of times since 1944, the transactions they approved. The depth they went into. They weren't rubber stamp approvals. If you look at the portion quoted on page 19 of my brief where, before giving approval they say:

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"... it is not felt that action can be taken on this motion without first obtaining additional information, such as the full history of the airplanes, including copies of the original bills of sale to Hughes Tool Company, a breakdown of the cost elements of each airplane, including the cost of each item of conversion, the amount of depreciation accrued on each airplane, an appraisal of the planes at cost or market value, whichever is lower, by an impartial third party, a statement of the use made of the planes from [24] the date they were purchased to the present date, including total number of flying hours, the total number of hours of use of each engine. It is assumed, of course, that Trans-Continental and Western Air, Inc., have secured all necessary consents and approvals to the proposed purchase required under or by reason of any prior commitments made by the carrier."

The CAB went into every one of these transactions. It isn't a question of their not knowing what they were approving. On page 20:

"... inevitably the controlling company, by virtue of its investment in the acquired carrier, will endeavor to make itself accountable—as indeed the acquirer here under scrutiny had—for the managerial efficiency, the operating economy, and the financial integrity of the controlled carrier. Accordingly, in determining whether or not a particular acquisition should be approved, it is necessary to consider the overall impact of the acquirer's plans and policies with respect to the controlled carrier."

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[25] You can look at page 21, the issue before them was giving us control of Northeast and how that was resolved. You bear in mind if we did anything or contemplated an order of the CAB giving us approval, the antitrust laws are not applicable to us and that is the basis of the jurisdiction of this Court.

I don't believe it is necessary to take a lot of time of this Court and spend a lot of money and keep a lot of attorneys busy for the purpose of finding out that there is no foundation or basis or merit in this lawsuit. But I submit in conclusion, your Honor, we have got to contrast on the one hand the rule which says the complaint does not have to disclose so long as it puts you on notice, and a statement of notice permitting a defendant to find out what it is a plaintiff is talking about.

I am fully aware of the many cases, Judge Weinfeld's many cases before the adoption of Rule 4 that under certain circumstances the ends of justice and the expedition of litigation requires some kind of concurrent discovery. But that is true in every case and the Special Master clearly recognized that in a finding where he said even if the question was [26] originally before him he would not find that it would expedite this litigation or serve the ends of justice by having concurrent depositions. So I don't think that is what TWA is really seeking to review. They say they are not seeking to review only to the extent that Rule 4 is to apply.

The Court: Let us ask Mr. Sonnett. You say you don't know what he is seeking.

Mr. Sonnett: We are requesting your Honor to hold that Rule 4 of the Civil Rules of the District Court applies to this case and for a further order pursuant to the provi-

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sion of Rule 4 directing that counsel for all parties shall meet and come to agreement upon the schedule of depositions under Rule 4 and in the event counsel should fail to agree on such a schedule, then the Special Master should determine the order of depositions to be followed. That was the Rule 4 aspect of our motion below and the Special Master, I respectfully submit, did not clearly hold one way or the other as to whether Rule 4 applies.

The Court: I think he held that he thought Rule 4 applied but that he wasn't going to use it, which he didn't have to do and which the Court doesn't have to do. I think, as I said to Mr. Davis, the [27] Court has the power to alternate without Rule 4. Obviously I did that in this very litigation in my order. It is inherent in the power of the Court to control the litigation before it. The only question I have is should I exercise the discretion that I have in calling for not a cessation but the interruption from time to time of defendant's examination of the plaintiff to allow the plaintiff to conduct its examination of the defendant. That is the only question I have before me.

Mr. Sonnett: I understood that was the question, and I am about to come to it. My second point is, I think the Special Master declined to exercise his discretion within and in accordance with the policy and purpose of Rule 4. I think that Rule 4 represents a very distinct addition to and a refinement of Rule 30 on motions to terminate or limit or alter depositions in this district.

After all our prior orders were entered, bearing in mind the general rule on first-come first-served, I think when this Court and your Honor issued Rule 4 you were saying it shall be generally the principle that depositions should be concurrent in [28] big cases and that lawyers ought to try to work out a schedule. If they can't, the Court will.

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Now as to why that new and I think very definite and wholesome policy should be applied in this case, your Honor will recall that back in February of this year your Honor issued an order in which your Honor laid out a tentative schedule of depositions based on the then existing rule of first-come first-served. Under that schedule of depositions as your Honor envisioned, all depositions would now be completed in this case. The last deposition on that list was supposed to be the deposition of Hughes Tool Company by Mr. Collier and Mr. Wentz but to commence on June 4th of this year. So instead of having completed 26 or whatever it is—I think it is 26 depositions—we have not yet completed the first of the depositions.

Mr. Davis is in error. We have had 23 days of testimony by Mr. Tillinghast. The record is now about 6000 pages. He says he is going to need some more time. We will have about between 25 and 30 days of testimony by the first witness. There is real prejudice involved to TWA if it is held off from commencing its depositions.

[29] The first point is that there are all sorts of public reports that Hughes has not been well. I don't know whether he has got a problem or not but on the present basis, unless we can go to concurrent depositions, we will be held off commencing the deposition of Hughes for at least a year because there is that long list of witnesses, as your Honor will recall, before we get anywhere near Mr. Hughes.

I don't know whether Hughes will be dead or alive six months from now. Nobody else does, but we would be held off quite a while and if the program is followed we will be held off at least another year. We have other witnesses we haven't noticed yet because hopefully we thought

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Rule 4 would be applied and directed to sit down with Mr. Davis and work out a schedule of other witnesses to fit them in on some practical workable basis as Rule 4 contemplates lawyers should do.

We have noticed Mr. Dietrich, who for many years was the chief lieutenant of Hughes up until 1957. He was the man who carried out Hughes' general orders and instructions and ran the Hughes empire, no question about it. Dietrich is in his seventies. [30] Like so many others, he parted company with Hughes and he is out in California. I don't know whether Mr. Dietrich is going to be around a year from now and nobody else knows. We have got a lot of very important evidence that we can't get at because of the schedule as it now stands, and where we now have a new rule that says, as I read it, that the Court should approach this kind of problem on the principle of concurrent depositions rather than on the other way around, it seems to me that the interests of TWA and all its stockholders really would be best served if we were given an opportunity to get at this testimony which may disappear forever before we can reach it. It is a publicly owned company in the sense that it has a substantial minority stockholding. It is an important public utility having its problems financially both because of Hughes and the situation in the airline industry generally and it needs to prosecute this case vigorously. Our hands are tied behind our back and I think Rule 4 was intended to prevent that, your Honor.

In terms of the Court's discretion, I think that is all I can say. We can work out as a practical matter, we could work out a program of concurrent [31] depositions. We did it in the old Ferguson case when the Special Master

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was there and concurrent depositions were going on quite often and the Master went from one room to another if there was a problem and he ruled and it worked.

We went ahead on that basis there. I see no reason for not permitting the truth which I am certain Hughes himself is best equipped to tell us, the details of how he tried to sabotage the Dillon Read financing plan, his acts to sabotage, and he is the one man who can tell us. The man operates under great secrecy, specializes in trying to conceal. Obviously his testimony is the only way we can get at the full truth here.

The Court: All right.

Mr. Barr: May I be heard very briefly on behalf of Equitable and Metropolitan? We join in the motion directly on the ground of why the Special Master should grant it, and I would like to address myself to that very briefly.

The Court: I think there is something in the papers about that.

Mr. Barr: Yes, Mr. Hupper's affidavit was [32] submitted. My name is Barr. Your Honor, since we, the additional defendants, got in this case back in February, I am reminded of the statement by Winston Churchill that this man is a riddle wrapped on an enigma. He made that statement and it applies to Mr. Hughes, both in the substantive matters alleged against us and the conduct of the discovery of this case. The real problem has been the riddle concerning Mr. Hughes, what he said, where he is, what he is doing. The Special Master on a number of occasions on the record of the deposition has expressed a great concern about the availability of Mr. Hughes; whether or not he will be available when the time comes to depose him.

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Indeed, the Special Master on occasion directed that correspondence be directed to Mr. Hughes concerning documents and that he respond in writing. That is something up to this point that has never been done.

Mr. Sonnett has I think indicated on a number of occasions that he made very diligent efforts to locate Mr. Hughes and find his whereabouts and get him into this case as a witness. Indeed, the tool company itself apparently cannot find Mr. Hughes, doesn't know where he is. In that respect, your Honor, I refer you to paragraph 5 of Mr. Hupper's affidavit, [33] some testimony by Mr. Holliday, who seems to be the front man, at least perhaps, a chief executive officer at the present time of the tool company. He testified in April of this year that he has not communicated with Mr. Hughes since October of 1961. There are rumors in the press that Mr. Hughes is ill and also all sorts of rumors floating around, some rumors even suggesting that Mr. Hughes is a myth, he doesn't really exist at all.

If Mr. Hughes is going to be unavailable, if he is not going to testify, come forward in this litigation, then I submit to your Honor that now is the time to find that out and that if the litigation is going to end then, it ought to end now before we take all this time and effort and find out that the principal actor in the proceeding simply is not going to show up. I think that is one special reason why your Honor should apply Rule 4 to these proceedings. Thank you, sir.

The Court: Decision reserved.

(Hearing closed.)

A-2267

Pretrial Order, July 23, 1962

**(MEMORANDUM ENDORSED ON MOTION PAPERS
DATED JULY 18, 1962)**

[Doc. 103]

[CAPTION]

61 Civ. 2324

July 23, 1962. After reading the briefs submitted in support of and in opposition to this application for clarification of the order of July 12, 1962, the application is denied. So ordered.

CHARLES M. METZNER
U.S.D.J.

A-2268

Pretrial Order, July 24, 1962

(MEMORANDUM ENDORSED ON MOTION PAPERS
DATED MAY 10, 1962)

[Doc. 93]

[CAPTION]

61 Civ. 2324

Defendant Hughes Tool Company has applied to the court to review the opinion of the Special Master rendered on April 17th, 1962 and the order of the Special Master contained in his letter of May 2d, 1962, as modified by his letter of May 3d, 1962, to the extent that the defendant is required to produce for inspection and copying by adverse parties any privileged communications between attorney and client.

The court has reviewed the opinion of the Special Master which appears in the transcript at pp. 4361-4391 and the letters referred to above. The Special Master has made an exhaustive study of the law applicable to the attorney-client privilege. The court agrees that the law is as stated by the Special Master both as to the privilege and the waiver thereof. The court sustains the ruling of the Special Master as he has applied the law to questions presented to him. If there are any specific documents concerning which the defendant desires specific rulings as to their admissibility, they may be submitted to the Special Master pursuant to the directions appearing at p. 4391 of the transcript

A-2269

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and in the letter of May 2d, 1962, as modified by the letter of May 3d, 1962.

So ordered.

Dated: New York, N. Y.
July 24, 1962

CHARLES M. METZNER
U.S.D.J.

Transcript of Pretrial Hearing, July 26, 1962

[Doc. 113]

[CAPTION]

61 Civ. 2324

Before: Hon. CHARLES M. METZNER, District Judge.
New York, July 26, 1962, 4:25 p.m.

[APPEARANCES]

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[3] The Court: Miss Lea, I will hear your application.

Miss Lea: Thank you. Mr. Davis is not here because he is continuing with conducting the deposition of Mr. Tillinghast, which is under your Honor's order to continue from day to day until we reach the time specified.

Our application this afternoon is really a very simple one, and I am not at all sure why it has occasioned some of the fuss and fury that it has on the part of Mr. Sonnett.

At any rate, it should not present any problem at all. Our motion is a very simple one, brought pursuant to Rule 33, asking that the Court extend and enlarge our time under that rule to answer the interrogatories in the form finally determined upon when your Honor entered your last order on this question. It is the Tool Company's position, I think it is manifest, that neither TWA nor anyone else can be prejudiced in any way by granting us this enlargement of time. We ask it on the basis, partially at least, that the month of August, during which we would otherwise be required to answer, is a month which has been set aside as a time to be free of discovery proceedings. During this month we were to suspend all discovery and to go over until sometime in [4] September. September 4th,

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I think, is the date it was to be resumed. In keeping with the special master's ruling that there be such a suspension, he determined that the answers to the counterclaims by the additional defendants, as well as by TWA, could be deferred during that period and would be deferred for a period of thirty days after your Honor's order determining that motion came down, and, in any event, would not be required to be answered before September 30th, which was in apparent recognition of the fact that we were to have at least a part of the summertime free.

A further problem which presents itself in answering the interrogatories before the time that we ask for is that this being summertime and being vacation time, it is reasonable to assume that many of the people from whom inquiry has to be made will not be available during this period, but will be off on their holidays.

To answer the interrogatories is not really a simple matter. Questions directed to a corporation, persons affiliated with a corporation, normally concern themselves with the business of the corporation. In this case, though, we have to make inquiry outside of the scope of the business of the corporation and ask further and additional questions of the persons listed in the [5] interrogatories, and I think it is reasonable to assume that this will take a greater period of time than might otherwise normally be the case.

A further factor which makes it difficult for the Tool Company to answer these interrogatories within a limited period of time is the fact that the officers of the Tool Company are not located in New York, they are located in Houston and in Los Angeles. The inquiries to be made must be made of persons who are not in New York, but

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who are at the various places where the Tool Company maintains its offices, and to some extent problems of communication and getting the papers in final form and so on may arise and all this during the period which under the special master's order is to be a free period.

TWA has stated that it requires this information in order to serve a subpoena upon Mr. Hughes for his appearance as a witness on deposition. In view of the fact they do not resume depositions until September 4th and then at that time the Tool Company does have the right to expeditiously proceed with its examinations, I don't think it is very reasonable to assume that TWA would have to serve a subpoena for the appearance of Mr. Hughes in advance of the time the Tool Company is requesting for answering the interrogatories. It is a practical matter [6] to a great extent in getting the answers up and framing them at this time of year.

The Court: How much time do you want?

Miss Lea: We have asked, your Honor, for until September 25th. We picked that date because it is approximately nineteen or twenty days after September 4th, which is the day that we resume, and if we resume then, that will give us a reasonable period of time, I believe, in which to file the answers. If we can have them before, if they can be prepared in the light of all the circumstances, we will certainly file them before that date, but we would like at least until then in which to get these answers ready for filing with the parties in court.

The Court: Is that all?

Miss Lea: Only one further matter. As your Honor might have noticed, we did request that the special master grant us an enlargement of time to September 25th and he

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stated his view that the earlier order of the Court precluded him from doing so, that your Honor's July 12th order meant to preclude an application for an enlargement of time under Rule 33.

The Tool Company is of the view that since it has never requested such enlargement and the Court did [7] not expressly or impliedly rule on it, that this question is an open question and that your Honor should determine it and that we have more than fifteen days from, I think it is the 24th or 25th of July, in which to answer the interrogatories.

The Court: Mr. Sonnett?

Mr. Sonnett: I am not quite sure, your Honor, whether I heard Miss Lea's colloquy, but there was some comment about sound and fury.

The Court: We are trying to find out whether we should give the Tool Company until September 25th to answer the interrogatories.

Mr. Sonnett: Yes, your Honor. I must say it always puzzles me that Mr. Davis is exceedingly anxious to take these appeals to your Honor, but he does not show up and sends a very charming lady to do these very difficult jobs.

The Court: I think we agreed at a prior hearing that Miss Lea was not relying on her charms to achieve her ends.

Mr. Sonnett: Her charm is evident; her persuasiveness is not. I hate to have to characterize the opposing affidavit as I am about to in one respect. Putting aside the argument, the representation in the [8] affidavit that there was some arrangement to recess the discovery proceedings so that everybody could have a month off is false. In the record at page 5142 the special master said as follows:

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"Mr. Reporter, I will put on the record the arrangement about the vacations during August. We will adjourn beginning August 1st and running through to September 4th so far as any proceedings are concerned before the special master."

That was very deliberately done by the special master and reflected an understanding on his part, and I thought, on the part of all counsel, based on what was said, that we were just suspending the taking of testimony before him and that nothing else in the case was to be suspended in any way. That was the arrangement, and it was quite clear.

I don't know whether your Honor has had an opportunity to read the decision of the special master which is here being appealed, but it appears at 6141 of the record, and I will read briefly what the special master did decide. He said as follows:

"I will deny the application. I construe Judge Metzner's order of July 12, 1962 to [9] contemplate that the answers to the interrogatories will be made in accordance with the rule and that he has already decided how the interrogatories shall be answered as to a certain date when the time shall be computed by his reference in paragraph one of that order, at the bottom of the page.

"Also, treating the matter without regard to Judge Metzner's order, assuming I have the power to act on it, I would deny the application because, as I have indicated before, I think it is most important in this litigation that the information as to the location of Mr. Hughes be furnished to TWA as soon as possible."

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He goes on discussing his views in that regard at some length, several pages of the record.

So that what your Honor has before you today is the special master said, first, he was bound by your Honor's order; he said, secondly, independently of that, as a matter of his discretion, based on his knowledge of this case over all these months, he would deny this if he were to exercise any discretion, and I think he was entirely sound.

I think this is a matter in which your Honor [10] should give his discretion great weight.

As to the history of the problem before your Honor today, we served and filed with the Court—I don't know whether the Court has had a chance to read it—a brief memorandum just setting forth the chronology of this particular matter. Your Honor will find that this has a long history, going back to March of this year. It is evident, I submit from that history, that for a period of over four months the Hughes Tool Company has been stalling on this question, and what they now would have your Honor do is give them another two months. If they are permitted to do this, the interrogatories will be completely meaningless and so will the answers because Hughes has known, I am sure, since March that the interrogatories was a problem that they were going to face.

I find, looking at this chronology, and I think the Court will agree with this thought, that from March right on there has been a calculated program here of delay. It is characterized by letters to the Court, by letters to the special master, by statements of misunderstanding by Mr. Davis and the like, knowing full well that he was under an order by the special master months ago to get this information up. Now his response to that is a very flat statement

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by him to the special master, [11] "I have taken no action" after these months, after the series of orders by the special master and the Court. It seems to me that counsel should not be permitted just to say, "I have taken no action." I don't think there is any showing, may it please the Court, of any basis on which they should have any extension of time. I don't think the rules were made to be set aside by counsel's whim, and that is what we are confronted with here.

If this were the first time the interrogatories question was up, I would feel rather differently, but the matter has been very much before the Hughes Tool Company and the Court and the special master since March. I don't think there is any showing of any reason why they should be given additional time.

The Court: I handed down my opinion July 12th. You will have to start with July 12th. Now, it is true, since you have had a broad interrogatory which has been sustained, that notwithstanding vacation plans of counsel, certainly vacation plans of employees who are employed have been advanced, and you may be met with an argument that these people are away and are not available. Now they can't be held at fault for that. They can't force their officers and employees to hang around while they make up the answers to interrogatories.

[12] Mr. Sonnett: They knew back in the spring, long before vacation time, about this.

The Court: They didn't know until I ruled upon it.

Mr. Sonnett: They knew they were under an order by the special master.

The Court: From which an appeal was taken tardily, but it was taken.

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Mr. Sonnett: Yes, and they knew and their employees knew. Now Mr. Davis has solved that problem in the course of colloquy at one point when he indicated it might be difficult to get hold of some of them, but I think the Court will be very much interested, and I know I will be, if it develops, for example, that Nadine Henley has been sent to Europe for three months. I think if we find we are being diddled, and I think that is what Mr. Davis has been doing with us, by moving out of range people who can give the answers, I think the Court will take as dim a view as I do of that.

The Court: There is nothing to prevent them from writing letters to wherever he is and getting answers by correspondence.

Mr. Sonnett: Exactly, your Honor. I think they can give us an answer to this in fifteen minutes.

[13] The Court: I also have to take into consideration the broadness of the interrogatories and the ability of the defendant to answer it properly.

Mr. Sonnett: I think if they were trying to make any kind of good-faith compliance here, in fifteen minutes by a phone call they can tell us where Mr. Hughes is, we would serve him with a subpoena returnable on a set date or such other date as may be fixed, and the whole problem would be laid to rest.

The Court: They may tell you now that Mr. Hughes is at some address in Los Angeles and by the time you get around there he is in Las Vegas at some famous address or in Houston, Texas or somewhere else. I don't think it is that easy. They could give you the Beverly Hills Hotel, I suppose, which is a commonly known address of Mr. Hughes. The Wall Street Journal carries it, The New York

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Times carries it. I assume everybody else knows about it, and I assume you have not been able to find him at the Beverly Hills Hotel.

Mr. Sonnett: We certainly have not. We have tried.

In the event that your Honor should feel that they should be given a little more time, I have prepared several supplemental interrogatories, and if your Honor [14] were disposed to allow another ten days or two weeks, whatever you think is reasonable, I would not seriously object, provided as a condition you require them to answer the supplemental interrogatories.

The Court: Let me hear them.

Mr. Sonnett: May I hand them up, your Honor? They are very simple.

The Court: Does Miss Lea have a copy?

Miss Lea: No, I do not.

Mr. Sonnett: I am about to give them to her.

May I say, your Honor, on the matter of the supplemental interrogatories that there are basically three, and what they are concerned with is as follows:

Interrogatory 1 of the supplemental interrogatories is designed to carry back the informational period to January 1, 1962. The reason for that is that because of the delays of the Hughes Tool Company since March, the answers to the interrogatories which we will get, particularly if they get any further extension of time, may well be meaningless because the people who will have the information will suddenly be unavailable, and it seems to me that carrying it back to January 1st does not impose any great burden.

[15] The second interrogatory is related solely to the question of communications with Mr. Hughes since January

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1, 1962, on the subject of his whereabouts or on the subject of these interrogatories, again a date prior to the first time Hughes Tool Company was ordered by anybody to answer these interrogatories or that the subject of the interrogatories came up.

Mr. Hughes, of course, knew in January 1962 that we were looking for him. There is no question about that. But he didn't know then that we were going to follow the interrogatory course when our private efforts proved unsuccessful.

The third interrogatory merely seeks to discover whether anybody who did know as of that time has had a change in status so that they are no longer employees within the scope of the order, that they have suddenly acquired some title of consultant or something else.

I might say on that point, your Honor, that we will probably be back to you some day with real problems about this business of consultants. At least Mr. Mahen, who is a private detective working for the Hughes Tool Company, really isn't that at all; he is some kind of a consultant. I simply mention that because I see problems of that kind coming up, and I think that if there has been [16] a change of status of any of these people since the 1st of January, your Honor should require them to tell us about that as a condition to giving them another ten days or two weeks, should your Honor think that be reasonable.

The Court: The time, I assume, has expired for the answers to the interrogatories.

Mr. Sonnett: I am sorry, Judge.

The Court: I assume that the time in those twenty days from July 12th—

Mr. Sonnett: The 15th, sir. It would be up tomorrow, the 27th.

Transcript of Pretrial Hearing, July 26, 1963

Miss Lea: Excuse me, your Honor, I think it is fifteen days from July 23rd or 24th, which is the date of your Honor's decision denying our application for clarification and modification of the July 12th order. I don't see how the time could be held to be running during the time the application was held pending before the Court.

The Court: I think I should have decided that by saying "Motion for reargument denied." Then your time runs from the original date, but I didn't.

Well, let us assume it is fifteen days from the 23rd—

Miss Lea: May I be heard in reply to some of the [17] things Mr. Sonnett has said?

The Court: We only have a question of fixing the date. Do you want to keep the record straight?

Miss Lea: Yes.

The Court: Go ahead.

Miss Lea: I don't want them to go unanswered. There is no right in TWA's demanding as an exercise of the Court's discretion that the Tool Company answer further interrogatories which Mr. Sonnett has just handed us in the courtroom.

Secondly, I don't know why or what kind of justification Mr. Sonnett can possibly believe he has for saying that Mr. Davis has been diddling. I don't know what the word means, but it is not something to which I would agree.

The Court: It is a derivation of "doodle".

Mr. Sonnett: Mr. Davis is an expert.

Miss Lea: I think it most unfortunate that counsel should make statements on the record indicating that he thinks other counsel is diddling or behaving in some other fashion in derogation of their rights or of their obligation to the Court, without having any basis for that. I think

Transcript of Pretrial Hearing, July 26, 1962

it is a most unfortunate and most serious statement which he has made in that respect.

[18] As to the special master's decision and the burden which may be imposed upon the Tool Company, the statements we have in our moving affidavit amply cover that. I think the reasons stated for the enlargement of the time are valid, and we should get an extension until at least September 25th.

Mr. Sonnett: May I say, your Honor, that in my opinion Mr. Davis has been trying to diddle us here.

The Court: Do you want to define the word "diddle," so Miss Lea will understand what you are talking about?

Mr. Sonnett: I will be happy to. I think diddling, at which Mr. Davis is an expert, is a purported compliance with the Court's order, but with tongue-in-cheek, with every intention to avoid them and escape their impact, and that is exactly what this record shows.

Now I am not alone in this conviction, your Honor, because your Honor will note from the record that the special master, fully familiar with this, denied the application as a matter of his own discretion, with the expectation that the Hughes Tool Company would have to answer these interrogatories by tomorrow, the 27th. Now he has watched Mr. Davis work intimately for some months, so that, I am, sorry to say, my opinion of Mr. Davis's [19] tactics, I think, is shared by the special master and that accounted for his decision.

Miss Lea: Now that I know what diddling means, I certainly don't agree with it, any more than I did before, nor with any of the remarks of Mr. Sonnett. I think the basis of the special master's decision appears in the transcript, which we have annexed to the affidavit filed with

Transcript of Pretrial Hearing, July 26, 1962

your Honor and I think our justification for believing that he was in error on that also appears there.

I have nothing more to say about it.

The Court: In the first place, Mr. Sonnett, I will not entertain this application for supplemental interrogatories served this moment upon the defendant. You may wish to submit them at some future date, but I won't entertain them at this time.

I will fix the date as August 27th for compliance.

Miss Lea: The 27th, your Honor?

The Court: August 27th. That is a Monday.

(Hearing concluded.)

[fol. 1491] [File endorsement omitted]

[fol. 1494]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
61 Civ. 2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY, and
RAYMOND M. HOLLIDAY, Defendants,

—and—

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED
STATES, METROPOLITAN LIFE INSURANCE COMPANY, IRVING
TRUST COMPANY, ERNEST R. BREECH, DILLON, READ &
CO., INC., BEN-FLEMING SESSEL, JAMES F. OATES, JR.,
HARRY C. HAGERTY and CHARLES C. TILLINGHAST, JR.,
Additional Defendants on Counterclaims.

AFFIDAVIT—Dated August 28, 1962

State of New York,
County of New York, ss.:

Robert G. Zeller, being duly sworn, deposes and says:

1. I am a member of the firm Cahill, Gordon, Reindel & Ohl, attorneys for the plaintiff, Trans World Airlines, Inc., ("TWA"), and am familiar with all prior proceedings had herein. I make this affidavit in support of plaintiff's motion for relief pursuant to Rule 37(d) of the Federal Rules of Civil Procedure.

2. By orders of this Court dated July 12, 1962, and July 26, 1962, the defendant, Hughes Tool Company [fol. 1495] ("Toolco"), was directed to answer on or before August 27, 1962, certain interrogatories propounded by plaintiff on May 2, 1962, pursuant to Rule 33 of the Federal Rules of Civil Procedure.

Affidavit of Zeller, August 28, 1962

3. Subsequent to the issuance of such orders but prior to August 27, 1962, certain correspondence was had between and among counsel for TWA, counsel for Toolco and the Court, copies of which correspondence are annexed hereto as Exhibit A (letter dated August 1, 1962 from Chester C. Davis, Esq. to John F. Sonnett, Esq.); Exhibit B (letter dated August 1, 1962 from Mr. Davis to Hon. Charles M. Metzner, U.S.D.J.); Exhibit C (letter dated August 2, 1962 from Robert G. Zeller, Esq. to Judge Metzner); Exhibit D (letter dated August 20, 1962 from Mr. Zeller to Judge Metzner); Exhibit E (letter dated August 21, 1962 from Judge Metzner to Mr. Davis); Exhibit F (letter dated August 21, 1962 from Mrs. Lola Lea to Mr. Zeller); Exhibit G (letter dated August 22, 1962 from Mr. Zeller to Mrs. Lea); Exhibit H (letter dated August 24, 1962 from Mrs. Lea to Mr. Zeller); and Exhibit I (letter dated August 24, 1962 from Mr. Zeller to Mrs. Lea).

4. When no answers to the interrogatories had been served by the close of business on August 27, 1962, I asked Mr. Chester C. Davis, counsel for Toolco, when I could expect to be served with answers to the interrogatories. Mr. Davis advised me that Toolco did not intend to answer such interrogatories.

5. On August 28, 1962, I received a letter from counsel for Toolco, a copy of which is annexed hereto as Exhibit [fol. 1496] J (letter dated August 27, 1962 from Mrs. Lea to Mr. Zeller); and on that same day sent to counsel for Toolco an answering letter, a copy of which is annexed hereto as Exhibit K (letter dated August 28, 1962 from Mr. Zeller to Mrs. Lea).

Robert G. Zeller

Subscribed and sworn to before me this 28th day of August, 1962.

Thomas J. Cerna, Notary Public, State of New York, No. 41-0607760, Qualified in Queens County. Certificate filed in New York County, Term Expires March 30, 1963.

A-2285

Affidavit of Zeller, August 28, 1962

[fol. 1497]

EXHIBIT A TO AFFIDAVIT

(Letterhead of Chester C. Davis, New York 5, N. Y.)

August 1, 1962

Re: *TWA v. Hughes Tool Company, et al.*

John F. Sonnett, Esquire
Messrs. Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York 5, New York

Dear Mr. Sonnett:

This is to confirm that I am authorized to accept process on behalf of Howard R. Hughes for his appearance as a witness on deposition in the above-entitled matter. In order to avoid further effort and expense by TWA to locate Mr. Hughes, I will acknowledge service on his behalf if you will deliver appropriate papers to me.

It should be understood that the foregoing is solely for the purpose of effecting service and is without prejudice to any and all rights of Mr. Hughes, the Hughes Tool Company or Raymond M. Holliday relating to the calling of Mr. Hughes as a witness on deposition.

Very truly yours,

/s/ CHESTER C. DAVIS
Chester C. Davis

A-2286

Affidavit of Zeller, August 28, 1962

[fol. 1498]

EXHIBIT B TO AFFIDAVIT

[Stamp—Received—C. G. R. & O.—Aug 2 1962—Referred to Mr. Sonnett]

(Letterhead of Chester C. Davis, New York 5, N. Y.)

August 1, 1962

Re: *TWA v. Hughes Tool Company, et al.*

Honorable Charles M. Metzner
United States District Judge
United States Court House
Foley Square
New York 7, New York

Dear Judge Metzner:

In connection with the interrogatories served by TWA on the Hughes Tool Company for the purpose of locating Howard R. Hughes in order to serve him with a witness subpoena to appear on deposition, there is enclosed a copy of a letter to Mr. Sonnett advising him that I am authorized to accept service of such process on behalf of Mr. Hughes.

Counsel for TWA has been questioning my authority to accept service on behalf of Mr. Hughes and has been insisting that I obtain written confirmation thereof. I am, therefore, enclosing a photocopy of such written authorization which I heretofore requested, and which I recently received.

It is respectfully requested that the enclosed photocopy of the authority which I received from Mr. Hughes be kept confidential and not be made a part of the record.

Very truly yours,

/s/ CHESTER C. DAVIS
Chester C. Davis

CC: Counsel for all Parties
(without enclosures)

Affidavit of Zeller, August 28, 1962

[fol. 1499]

EXHIBIT C TO AFFIDAVIT

August 2, 1962

Re: *TWA v. Hughes Tool Company, et al.*

Dear Judge Metzner:

In Mr. Sonnett's absence, I received this morning from counsel for Toolco a copy of a letter dated August 1, 1962 written to you, together with a letter of the same date to Mr. Sonnett advising him that Toolco's counsel was now authorized, presumably by Mr. Hughes, to accept service of process on behalf of Mr. Hughes for his appearance as a witness on deposition in this case. Although Toolco's counsel, Mr. Davis, apparently sent to you a copy of written confirmation of his authorization, no copy of the written confirmation was sent to us.

I called Mr. Davis' office and in his absence spoke to Mr. Maxwell Cox to request a copy of that confirmation. I told Mr. Cox that I had noted Mr. Davis' desire that the confirmation be kept confidential and offered to treat our copy of such confirmation as a confidential document under the terms of the Special Master's order of March 21, 1962 relating to confidential documents. Mr. Cox advised me that he was unable to permit me either to look at the authorization or to furnish me a copy of it.

As Mr. Sonnett pointed out in the argument before the Special Master on July 31, 1962, the crux of this matter is that any authorization by Mr. Hughes to counsel must be irrevocable or it is apt to prove meaningless.

[fol. 1500] It was for this reason that we prepared the proposed stipulation and form of order which was submitted to Toolco's counsel on July 31, 1962, but which Toolco's counsel refused to consider. I understand that that proposed stipulation and form of order have been transmitted to you along with the transcript of the argument on

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Affidavit of Zeller, August 28, 1962

that day. Under the circumstances, our position must remain as stated at that time.

Very truly yours,
Robert G. Zeller

Hon. Charles M. Metzner
United States District Judge
Southern District of New York
United States Court House
Foley Square
New York 7, New York

cc: Special Master
All Counsel of Record

[fol. 1501]

EXHIBIT D TO AFFIDAVIT

August 20, 1962

Re: *TWA v. Hughes*

Dear Judge Metzner:

Last week we learned from what we consider a reliable source that Howard R. Hughes was at the Beverly Hills Hotel in Los Angeles, California. On Friday, August 17th, attempts to serve Mr. Hughes with a subpoena duces tecum under Rule 45 F.R.C.P. were made both by private process servers and by the United States Marshal. These attempts were unsuccessful. We were advised by the Marshal that he was referred to the Hughes Tool Company office at 7000 Romaine Street, Los Angeles, California and was told by that office that service of such process could be made only on Mr. Davis of New York.

A-2289

Affidavit of Zeller, August 28, 1962

We expect to try again to serve Mr. Hughes when we receive on Monday, August 27th, the answers of Hughes Tool Company to our interrogatory as to Mr. Hughes' whereabouts.

Very truly yours,
Robert G. Zeller

Hon. Charles M. Metzner
United States District Judge
Southern District of New York
United States Court House
Foley Square
New York 7, New York
cc: Chester C. Davis, Esq.

BGZ:neb
Mailed 8/20/62

[fol. 1502]

EXHIBIT E TO AFFIDAVIT

(Letterhead of United States District Court,
New York 7, N. Y.)

August 21, 1962

Mr. Chester C. Davis
120 Broadway
New York 5, New York

Re: *TWA v. Hughes Tool Co.*

Dear Mr. Davis:

This will confirm the telephone conversation today of my secretary, Miss Lowers, with Mrs. Lea of your office.

Upon my return from vacation I found your letter of August 1st with its enclosures of a photocopy of what you say is a written authorization from Mr. Hughes to accept service on his behalf of a witness subpoena in the above entitled matter and a copy of your letter to Mr. Sonnett

A-2290

Affidavit of Zeller, August 28, 1962

dated August 1st, 1962. In view of your insistence that the photocopy of the authority be kept confidential and not be made part of the record and your failure to furnish a copy to Mr. Sonnett, I must proceed on the basis that it is not properly before the court. Consequently, I am returning to you said photocopy.

In the circumstances, I will expect that you will comply with the order of the court of July 26th, 1962.

Whatever further conversations you wish to have with Mr. Sonnett or the Special Master on this matter are solely within your discretion.

Very truly yours,

/s/ CHARLES M. METZNER

CMM:dl

cc: Counsel for all parties
Special Master

[fol. 1503]

EXHIBIT F TO AFFIDAVIT

(Letterhead of Chester C. Davis, New York 5, N. Y.)

August 21, 1962

Robert G. Zeller, Esquire
Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York 5, New York

Dear Mr. Zeller:

This is to confirm receipt, by mail, of a copy of your letter of August 20, 1962 to Judge Metzner and of a copy of TWA's Notice of Taking Deposition of Howard R. Hughes, as a witness, in Los Angeles, California, on September 24, 1962. I assume that the Notice was filed for the purpose of obtaining the subpoena referred to in the letter.

A-2291

Affidavit of Zeller, August 28, 1962

Mr. Davis has asked me to advise you that upon his return to New York, he will be glad to make arrangements with you for the service of the subpoena on him, which he is authorized to accept on behalf of Mr. Hughes.

Very truly yours,

/s/ **LOLA S. LEA**
Lola S. Lea

cc: **Honorable Charles M. Metzner**
United States District Judge
United States Courthouse
Foley Square
New York 7, New York

J. Lee Rankin, Esquire
36 West 44th Street
New York 36, New York

[fol. 1504]

EXHIBIT G TO AFFIDAVIT

August 22, 1962

Re: *TWA v. Hughes*

Dear Miss Lea:

This will acknowledge receipt of your letter of August 21st. For the reasons stated in my letter of August 2nd to Judge Metzner, and stated earlier at the hearing before the Special Master on July 31st, we do not believe that our client's interest would be adequately protected by relying upon service of the Hughes subpoena on Mr. Davis in the absence of irrevocable authority from Mr. Hughes along the lines of that proposed in our draft stipulation. So far as we are aware, that irrevocable authority has not been granted.

Affidavit of Zeller, August 28, 1962

We therefore await with great interest the service on August 27th of Toolco's answers to our Interrogatory as to Mr. Hughes' whereabouts.

Very truly yours,
Robert G. Zeller

Lola S. Lea, Esq.
Chester C. Davis
120 Broadway
New York 5, N.Y.

cc: Honorable Charles M. Metzner
J. Lee Rankin, Esq.

[fol. 1505]

EXHIBIT H TO AFFIDAVIT

(Letterhead of Chester C. Davis, New York 5, N. Y.)
BY HAND August 24, 1962

Re: *TWA vs. Hughes Tool Company, et al.*

Robert G. Zeller, Esq.
Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York 5, N. Y.

Dear Mr. Zeller:

Referring to the letter of Judge Metzner dated August 21, 1962, there is enclosed a copy of the written authority from Mr. Hughes to Mr. Davis which is being filed with the Court today. I understand from your letter of August 2, 1962 to Judge Metzner that you agree to treat the authorization as a confidential document under the terms of the Special Master's order of March 21, 1962 relating to confidential documents.

Your letter dated August 22, 1962 points out that you do not believe that your client's interest would be adequately protected by a service on Mr. Davis because you do not know whether the authority of Mr. Davis is irrevocable.

A-2293

Affidavit of Zeller, August 28, 1962

May I suggest that the problem would be solved if you were to serve Mr. Davis promptly and before any question as to revocability could arise.

I assure you again that Mr. Davis will accept service of whatever subpoena you have obtained whenever you care [fol. 1506] to submit same to this office. If you prefer to have Mr. Davis personally available at that time, please so advise.

Very truly yours,

/s/ LOLA S. LEA
Lola S. Lea

Encl.

cc: Hon. Charles M. Metzner

J. Lee Rankin, Esq.
All Counsel

[fol. 1507]

EXHIBIT I TO AFFIDAVIT

August 24, 1962

Re: *TWA v. Hughes Tool Company, et al*

Dear Mrs. Lea:

This will acknowledge receipt of your letter of August 24, 1962 and the copy of what you say is the written authority from Mr. Hughes to Mr. Davis. We offered to treat this document as a confidential one under the terms of the Special Master's Order of March 21, 1962 relating to confidential documents, and will do so. Now that I have seen the document, however, I must say I am unable to see why anyone could possibly be interested in having treated it as a confidential document.

I am glad to have your assurance that Mr. Davis will accept service of the subpoena upon Mr. Hughes which we have obtained, and to have your suggestion that we serve Mr. Davis promptly in order to avoid any question of revocation. In view of the contents of the document trans-

Affidavit of Zeller, August 28, 1962

mitted with your letter, however, I can see that many questions other than revocation might be raised.

We therefore continue to feel as we have in the past that our client's interest would be better protected by service of process upon Mr. Hughes personally than upon Mr. Davis as Mr. Hughes' agent to receive service. We will continue to await Toolco's answers on August 27th to our Interrogatory as to Mr. Hughes' whereabouts.

Very truly yours,
Robert G. Zeller

Lola S. Lea, Esq.
Chester C. Davis
120 Broadway
New York 5, N. Y.

cc: Honorable Charles M. Metzner
J. Lee Rankin, Special Master
ALL Counsel

[fol. 1508]

EXHIBIT J TO AFFIDAVIT

(Letterhead of Chester C. Davis, New York 5, N. Y.)

August 27, 1962

Re: *TWA vs. Hughes Tool Company, et al.*

Robert G. Zeller, Esq.
Cahill, Gordon, Reindel & Ohl
80 Pine Street
New York 5, N. Y.

Dear Mr. Zeller:

Referring to your letter of August 24, 1962 and your telephone conversation of this afternoon with Mr. Davis, this is to confirm that Toolco understands that it has complied with the order of the Special Master, affirmed, except as modified, by the order of the Court dated July 12, 1962 as amended by order dated July 26, 1962. As you will recall,

Affidavit of Zeller, August 28, 1962

said order required Toolco to answer certain interrogatories in the event that Mr. Hughes failed to furnish written authorization to accept service of a deposition subpoena.

The authority of Mr. Davis to accept service on behalf of Mr. Hughes having been confirmed in writing and filed with the Court and the Special Master, we do not understand what proper interest of your client remains in seeking answers to interrogatories as to the whereabouts of Mr. Hughes.

[fol.1509] As previously indicated, Mr. Davis is available to you at your convenience.

Very truly yours,

/s/ LOLA S. LEA
Lola S. Lea

cc: Hon. Charles M. Metzner

J. Lee Rankin, Esq.
Special Master

All Counsel

[fol. 1510] EXHIBIT K TO AFFIDAVIT

(Letterhead of Cahill, Gordon, Reindel & Ohl,
New York 5, N. Y.)

August 28, 1962

Re: *TWA v. Hughes Tool Company, et al.*

Dear Mrs. Lea:

This is to acknowledge receipt of your letter of August 27th.

The order to which you refer was ~~not~~ a conditional order. The order directed Toolco to answer TWA's interrogatory as to Mr. Hughes' whereabouts on or before August 27, 1962.

Affidavit of Zeller, August 28, 1962

As counsel for TWA, we were willing to agree, subject to Judge Metzner's approval, that it would not be necessary for Toolco to answer the interrogatory if Mr. Davis received written authorization from Mr. Hughes which, in our opinion, was sufficient to make the personal service of a subpoena upon Mr. Davis the legal equivalent of personal service upon Mr. Hughes. No such adequate authorization has ever been given to Mr. Davis, and we have never consented to any departure from the express and precise terms of the order entered on July 26, 1962, compliance with which was again directed in Judge Metzner's letter of August 21, 1962. Moreover, at no time has it been possible for you to be under any reasonable misapprehension that we considered the photocopy of a piece of paper finally transmitted with your letter of August 24, 1962 to be an adequate authorization.

[fol. 1511] It is plain that Toolco has deliberately defied the Court's order. We will serve upon you later today a motion for the granting of appropriate relief.

Very truly yours,

/s/ ROBERT G. ZELLER
Robert G. Zeller

Lola S. Lea, Esq.
Chester C. Davis
120 Broadway
New York 5, New York

cc: Hon. Charles M. Metzner
J. Lee Rankin, Esq.,
Special Master

All Counsel

[fol. 1512] Affidavit of Service (omitted in printing).

[fol. 1514] [File endorsement omitted]

[fol. 1515]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
61 Civ. 2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and
RAYMOND M. HOLLIDAY, Defendants,

—and—

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED
STATES, et al., Additional Defendants on Counterclaims.

MEMORANDUM REVIEWING THE HISTORY OF TWA'S APPLICATION FOR PERMISSION TO PROFOUND AN INTERROGATORY TO HUGHES TOOL COMPANY CONCERNING THE LOCATION OF HOWARD R. HUGHES—Filed August 30, 1962

This memorandum contains a chronological review of the proceedings in the above-entitled action relating to the application of Trans World Airlines, Inc. (herein TWA) to propound an interrogatory to the Hughes Tool Company (herein Toolco) concerning the location of Howard R. Hughes (herein Hughes) and is filed in support of TWA's [fol. 1516] motion for relief pursuant to Rule 37(d) of the Federal Rules of Civil Procedure.

The following is a list of dates along with a description of the activity on that date:

<i>Date</i>	<i>Description of Activity</i>
March 22, 1962	Direction of the Special Master permitting the submission of briefs on April 2, 1962 concerning the authority of the

Memorandum

Court to obtain from Toolco or anyone else information as to the location of Hughes in order to permit service of process upon him. (Tr. 3626-3627)

April 2, 1962

Memorandum filed on behalf of TWA in response to the request of the Special Master noted above.

April 3, 1962

Date of letter of Toolco counsel to Special Master suggesting that no proper application had been made for the serving of an interrogatory by TWA.

April 4, 1962

Date of letter of TWA counsel to Special Master citing his request as noted above that such memoranda be submitted, and requesting that, if the prior proceedings were not sufficient, the letter should be considered as an application and the giving of due notice.

April 17, 1962

Date of hearing and decision of Special Master granting TWA the right to propound an interrogatory to Toolco concerning the location of Hughes. (Tr. 4401)

April 27, 1962

Last day on which Toolco had right to appeal from the Special Master's decision granting TWA the right to propound the interrogatory.

[fol. 1517]

April 27, 1962

Date of letter of Toolco counsel to the Special Master stating that Toolco was "not in a position at this time to seek review" of the Special Master's decision to serve the limited interrogatory and stating that it was Toolco's understanding that it would have a right to object to the form and substance of any interrogatory after it had been served.

Memorandum

- April 30, 1962 Date of letter of the Special Master to Toolco counsel in answer to Toolco's letter of April 27, 1962, stating that TWA was authorized to serve an interrogatory forthwith and allowing Toolco two days after the service of such interrogatory within which to file any objections.
- May 2, 1962 TWA interrogatory served on Toolco, requiring an answer by May 17, 1962.
- May 11, 1962 Date of notice of Toolco's motion and objections before the Special Master to the TWA interrogatory, objecting both to the form of the interrogatory and also to TWA being allowed to serve such interrogatory at all.
- May 17, 1962 Date of memorandum of TWA in opposition to Toolco's objections.
- May 28, 1962 Date of memorandum of Toolco in support of its objections.
- June 4, 1962 Hearing and second order of the Special Master, directing that the interrogatory should be answered on June 20, 1962. (Tr. 4472-4473)
- June 7, 1962 Notice of Motion of Toolco for review and reversal of Special Master's order overruling Toolco's objections to the interrogatory. This "Notice" did not specify a day certain for the return date, and Toolco appears to have made no attempt to arrange for such date.
- [fol. 1518]
- June 11, 1962 Date of letter of Toolco counsel to the Special Master attempting reargument of the Special Master's ruling granting TWA the right to propound the interrogatory.

Memorandum

- June 14, 1962 Date of letter of Special Master answering Toolco counsel's letter of June 11, 1962, rejecting the attempt to reargue the Special Master's order, and distinguishing the authorities cited in the Toolco letter.
- June 22, 1962 Date of letter from counsel for TWA to Judge Metzner requesting that Toolco's motion for review be denied without further hearing or alternatively requesting an early hearing.
- July 10, 1962 Date of memorandum of Toolco in support of its motion for review and reversal of the Special Master's order overruling its objections to the interrogatory.
- July 12, 1962 Date of TWA memorandum in opposition to the Toolco motion regarding the interrogatory.
- Date of hearing before Judge Metzner and pre-trial order granting TWA the right to propound an interrogatory to Toolco concerning the location of Hughes.
- July 13, 1962 Date of letter from counsel for TWA to counsel for Toolco specifying July 27, 1962 as date by which responses to interrogatory were to be made, computed according to pre-trial order of July 12, 1962.
- July 18, 1962 Date of notice of motion and memorandum by Toolco for an order by Judge Metzner clarifying or modifying the pre-trial order dated July 12, 1962 regarding the interrogatory. This "notice" did not specify a day certain for the return date, and Toolco appears to have made no attempt to arrange for such a date.

Memorandum

[fol. 1519]

July 20, 1962

Date of memorandum of TWA regarding the attempt of Toolco to avoid answering the interrogatory on the location of Hughes.

July 23, 1962

The following statement was made on the record by Toolco's counsel regarding the efforts which he had made to comply with the outstanding orders of the Court concerning answering the TWA interrogatory:

"In other words, I have taken no action. I am not in a position to take any action in transmitting these interrogatories to the Tool Company for an appropriate time until I am in a position to say this is what you are supposed to answer." (Tr. 5828)

Oral application by Toolco counsel before the Special Master for an order extending its time to answer the interrogatory beyond July 27, 1962. (Tr. 5828 *et seq.*)

Date of decision of Judge Metzner denying the Toolco motion to modify or clarify the interrogatory.

July 24, 1962

Argument on the part of Toolco counsel before the Special Master in support of its oral application for an extension of time to answer the interrogatory and decision of Special Master denying the application on the basis that the Special Master has no power to modify the Court's orders and, if he did have power, he would refuse the extension, in the exercise of his discretion. (Tr. 6128 *et seq.*)

Memorandum

July 26, 1962

Application by Toolco for an order enlarging the time within which it could answer the interrogatories to September 25, 1962.

Order of Court extending Toolco's time to answer interrogatories to August 27, 1962.

[fol. 1520]

July 27, 1962

Statement by counsel for Toolco that he had received authorization to accept service of subpoena on behalf of Howard R. Hughes (Tr. 6457 *et seq.*)

July 31, 1962

TWA offered Toolco proposed stipulation providing for personal service upon Chester C. Davis of subpoena directed to Howard R. Hughes in lieu of receiving answers to interrogatories. This stipulation was rejected by Toolco, Toolco's counsel stating that he wanted instead to leave the matter as it had been left by Judge Metzner's order. (Tr. 6714; Exhibit L annexed hereto).

TWA stated its intention to proceed therefore in accordance with the Court's schedule (Tr. 6718-6719; Exhibit M annexed hereto), and the Special Master determined that there would be no modification by him of the Court's order (Tr. 6723; Exhibit N annexed hereto).

August 1, 1962

Letter from Mr. Davis to Mr. Sonnett stating that Mr. Davis was authorized to accept service of a subpoena on behalf of Howard R. Hughes.

Letter from counsel for Toolco to Judge Metzner enclosing a photocopy of purported written authorization to accept service on behalf of Howard R. Hughes.

A-2303

Memorandum

August 2, 1962

Letter from counsel for TWA to Judge Metzner stating that TWA had not received a copy of the purported authorization.

August 20, 1962

Letter from counsel for TWA to Judge Metzner advising the Court that TWA had been unsuccessful in its attempts to serve a subpoena on Howard R. Hughes on August 17, 1962 and advising the Court that such attempts would be renewed after receipt of answers to the interrogatories.

[fol. 1521]

August 21, 1962

Court advised Toolco by letter that it was returning "what you say is a written authorization from Mr. Hughes" and that it expected compliance with its order of July 26, 1962.

Letter from counsel for Toolco again stating that Mr. Davis was authorized to accept service of a subpoena on behalf of Mr. Hughes.

August 22, 1962

Letter from counsel for TWA to counsel for Toolco stating belief that TWA's interest would not adequately be protected by service upon Mr. Davis and advising that TWA awaited service of answers to its interrogatories.

August 24, 1962

Letter from counsel for Toolco to counsel for TWA containing photocopy of purported authorization and requesting it be kept confidential.

Letter from counsel for TWA to counsel for Toolco stating that TWA intended to await Toolco's answers to interrogatories after considering purported authorization.

Memorandum

August 27, 1962

Counsel for Toolco, Chester C. Davis, told counsel for TWA that he had no intention of answering the interrogatories.

Date of letter from Mr. Davis' associate counsel, Mrs. Lola Lea, confirming Toolco's intention not to answer interrogatories.

Respectfully submitted,

Cahill, Gordon, Reindel & Ohl, Attorneys for Plaintiff, Trans World Airlines, Inc., Office and P. O. Address: 80 Pine Street, New York 5, New York.

Of Counsel: John F. Sonnett, Dudley B. Tenney, Robert G. Zeller.

August 30, 1962.

Transcript of Pretrial Hearing, September 6, 1962

[Doc. 355]

[CAPTION]

61 Civ. 2324

Before: Hon. CHARLES M. METZNER, *District Judge.*
New York, September 6, 1962, 11:30 a.m.

[APPEARANCES]

.

[3] The Court: You may proceed, Mr. Sonnett.

Mr. Sonnett: May it please the Court, we have served with our motion a memorandum which sets forth the chronology of our efforts to obtain some disclosure of information as to the whereabouts of Howard Hughes, and I don't propose to burden the Court with a recital of that chronology except to point out that we started in March of this year and we are still at it.

I will have a reply affidavit in a moment to serve which I think contains some exceedingly significant information. Before coming to that, may I say to the Court that I believe on the basis of the record to date, and in light of your Honor's letter to counsel, in which you stated when returned a photocopy of the alleged authority that you would expect compliance with the Court's order so that the interrogatories will be answered on the 27th of August, but I think your Honor made crystal clear, if there was any doubt about it, and there wasn't, that Hughes Tool Company was to supply this information.

Instead of doing that, the Hughes Tool Company elected to disregard the Court's two prior [4] orders and the Court's letter. Now it seems to me that the attitude

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demonstrated by the Hughes Tool Company is in such willful and deliberate disregard of specific unambiguous directions by the Court that the contempt shown to the orders of the Court is more grievous than that shown in the Friedman case in which Judge Sugarman granted a default judgment in excess of 12 million dollars.

In that situation—I don't know whether your Honor has had a chance to see the text of the memorandum opinion, may I hand it up? Unfortunately I only have one copy.

The Court: Has it been published?

Mr. Sonnett: No, sir.

The Court: I will get a copy from Judge Sugarman.

What is the title?

Mr. Sonnett: Friedman v. United States Trunk Company, 62 Civil 73, and the memorandum is dated August 16, 1962.

In that situation, where a defendant ignored a notice to take depositions, ignored a motion for a default and simply did not appear, Judge Sugarman, having found that there was a deliberate refusal to [5] pay any attention to the Court's orders, had no difficulty in awarding a default judgment in excess of 12 million dollars.

The record in this situation, I submit, is much more serious because here there is a crystal clear proof of specific notice contained in a direction by the Special Master to the effect that he would not interfere in the slightest with this Court's order by reason of any alleged authority that Mr. Davis had to accept process.

The direction of this Court in its two orders and in the letter most recently sent it, I think, open to no misunderstanding.

I think that the conduct, therefore, of Hughes Tool Company can only be characterized for what it was, a

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deliberate, willful intention to refuse to comply with the directions of the Court.

I might rest at that point, your Honor, but something has come to my attention in point of fact only definitely yesterday and last night. It has led to the necessity to file reply affidavits which contain very grievous charges against the Hughes Tool Company.

I would like to hand the affidavit up and to serve it now. I regret that I could not do it [6] sooner. In point of fact, my affidavit was just finalized and signed this morning. If your Honor would wish to read the affidavit, it would be a lot easier than my recital of it.

The first five paragraphs is set forth substantially what I have already said. The new material is contained in paragraph 6.

After very careful and thorough consideration of the gravity of the charges made in this affidavit, I felt impelled to make the charges there contained—

The Court: They are serious charges.

Mr. Sonnett: The serious charge is that the Hughes Tool Company deliberately submitted to this Court, in an attempt to defraud the Court and mislead it, a forged document.

Your Honor will note that annexed to my affidavit is an affidavit by a leading examiner of questioned documents, Mr. Charles Andrew Appel, Jr.

Mr. Appel's qualifications cannot be gainsaid. For many years he was a special agent of the FBI in charge of document work and since his retirement from the FBI he has been engaged in a great number of cases of major significance.

I had Mr. Appel come up because I was concerned [7] when I saw this alleged authorization, and I had him

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come to New York and he did yesterday morning. We spent the entire day on this matter.

Your Honor will find he set forth in detail his reasons in the exhibits annexed for the conclusion that Howard R. Hughes did not make the signature contained on the so-called authorization represented to this Court to be an authorization to accept service of process.

I would like to make it clear that I have no information, nor do I personally believe, that Mr. Davis had any knowledge of this. However, I represent to your Honor that on the record before you it is beyond doubt that somebody in the Hughes Tool Company wilfully, knowingly, purposefully, in order to mislead counsel for TWA and this Court, submitted a forged document.

I think on that ground alone your Honor should strike the answer and give us a default judgment.

If your Honor has the slightest doubt about it, I am prepared to call Mr. Appel to the stand right now. He is here for cross-examination. I think your Honor should direct, if you have the slightest [8] doubt—and this record admits of no doubt—that everyone connected with the Hughes Tool Company who had any connection with the forged authorization be called before this Court to testify under oath forthwith.

The Court: Mr. Sonnett, obviously your opponent has just been served with this document three minutes ago and should be afforded an opportunity to answer the serious charges contained in your affidavit. I will give the attorney for the Hughes Tool Company one week to submit affidavits in refutation of these charges.

Aside from this charge, Mrs. Lea, the charge that the signature of Howard Hughes to the purported author-

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ization for Mr. Davis to accept service in this proceeding is forged, have you anything else to say regarding the motion of Mr. Sonnett to strike your answer?

Mrs. Lea: In the first instance I would like to point out, as your Honor is aware, that I have just been served with this piece of paper. I think the charges are undoubtedly ridiculous and completely without foundation. I appreciate your Honor's indulgence in giving us time to formally make any [9] statement with respect to those charges. I wish, however, to point out that the written authorization was merely confirmation of authority which had been received, and I am not quite sure that this affects the problem whatsoever.

As a matter of fact, at this posture of the proceedings I don't think we any longer have a problem. The problem has been mooted for the reason that the United States Marshal for the Southern District of California has indicated this morning that he served Mr. Hughes by delivering a copy of the subpoena to Mr. Davis who was authorized to accept that subpoena on Mr. Hughes' behalf. The return has been filed and is in the office of the clerk.

As far as I can determine, at this point there is no question of service open for decision.

The Court: Was the service made on the exhibition by Mr. Davis of the authorization that you have filed in this court?

Mrs. Lea: I believe the service was made upon a delivery to the United States Marshal of an affidavit by Mr. Davis, indicating he was in fact authorized to accept service, and it was on the basis of Mr. Davis' affidavit that—

Transcript of Pretrial Hearing, September 6, 1963

[10] The Court: It seems we are having a lot of last minute developments today, first a charge of forgery and then a statement that Mr. Hughes was actually served.

Do you know of any service by the United States Marshal for the Southern District of California, Mr. Sonnett?

Mr. Sonnett: In the light of the unsatisfactory state of the record, we did make an effort several weeks ago to serve Mr. Hughes in Beverly Hills. We made that effort with private investigators and with the United States Marshal. The effort was unsuccessful.

Thereafter, I am told—I was not here—that Mr. Davis represented that he was going to be here in court today to deal with this matter. Apparently what he saw fit to do was to go out and try to blunt the point of this motion and to frustrate it by going to the Marshal and saying, "Look here, I am authorized to take it for Mr. Hughes."

I regard what Mr. Davis has done, and I think the Court should, as a nullity.

Moreover, I think that in the light of the very well founded charge that a fraud was attempted [11] to be worked on this Court that all matters should be held in abeyance until the Court determines whether to call witnesses in here under cross-examination to find out how widespread the scheme was. All I can say is that one of the leading document examiners in the United States tells me and tells the Court under oath, and he is here for cross-examination and will be at any time if anybody wants him, that the signature on that authorization is not the signature of Howard R. Hughes.

I don't know what kind of games Mr. Hughes or the Hughes Tool Company thinks they can play with the Court of the United States. I for one do not think they can

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play that kind of game. I don't know if your Honor wishes me to have Mr. Appel available for cross-examination today or a week from now, but he will be available at any time.

The Court: I will deal with the allegation of forgery separate and apart from the problem of the authorization, its legal effect and whether service was actually made on Mr. Hughes today.

So, Mr. Appel, if necessary, will be called at some time in the future after I have received the answering affidavits of the defendant Hughes Tool [12] Company to the charges contained in your reply affidavit which they were just notified of this morning. At that time we can take care of that problem.

When is the return date of the subpoena that was served this morning, Mr. Sonnett?

Mr. Sonnett: If it was served, my understanding of what Mrs. Lea said is that the service was on Mr. Davis as the alleged agent of Mr. Hughes. If that constitutes service, which I doubt in these circumstances, the return date of the subpoena would be September 24th.

The Court: If Mr. Hughes appears on September 24th, then hasn't all of this been moot?

Mr. Sonnett: If there was, as I believe, fraud on the Court, the question of the punishment the Court wishes to impose for what I regard as contempt, if Mr. Appel is right somebody ought to be punished for attempting to misrepresent this document to this Court.

The Court: I have never relied on that document, and that is why I returned it twice, the two times that it was submitted to me, first on a confidential off-the-record basis and then in [13] conjunction with an affidavit to seal it.

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My letter clearly indicated that I wanted nothing to do with that document. You could file it if you wanted to, but I was not going by any action on my part to indicate that I accepted that document or rejected it. It was a question which would have to be presented in the normal fashion.

My letter indicated that any further negotiations between Mr. Davis and you be had directly with you, and the Court was not going to be part of it.

Mr. Sonnett: Yes.

The Court: That was the reason for it. I did not know what that document meant, whether it had any meaning at all. It was on a blank piece of paper without a date, without an address, without any mention of this case, so until you two were willing to present it to the Court in a more formal fashion, I was refusing to have anything to do with it.

The first step was taken, I think, last Friday when the attorney for the defendant did serve me with a copy and did file it in this court.

Mr. Sonnett: When we then had a chance to [14] analyze that document for the first time, we found all of the defects you pointed out but we found one more, it was not only a nullity legally but it was a fraud.

The Court: I am not saying it was a nullity legally. I purposely refused to touch the piece of paper because I did not want to have any action taken by me as any indication that I was passing upon the legal effect of the document.

Mr. Sonnett: Exactly. You then said to counsel for Hughes Tool Company that they would be expected to answer.

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The Court: They did not work out anything with you, that is why I added the last sentence that they carry out further conversations with you.

Mr. Sonnett: Nothing was done except to refuse to comply with the orders of the Court.

The Court: We have two problems.

Is Mr. Hughes going to appear on September 24th? By doing that, I suppose he would validate whatever affidavit Mr. Davis gave to the United States Marshal today to justify acceptance of service of the subpoena on his part.

The other problem is the document that has [15] been filed in this court which you claim is a forgery.

So we will have to let both of them stand in abeyance. The first one until September 24th and the second one to the filing by the attorney for the Hughes Tool Company on a week from today an answer to the charges contained in your reply affidavit that you served on defense counsel ten or fifteen minutes ago.

If you want additional time after receipt of that answer to file a reply, you may have it.

Mr. Sonnett: I would like to have three days after the receipt of the affidavit within which to file any further affidavits or to seek leave of the Court to examine under oath those who participated in what I regard as a deliberate attempt to commit a fraud on this Court.

The Court: All right.

Mrs. Lea: May I clarify several things on the record.

First, the reference by Mr. Sonnett to Mr. Davis' intention or representation to be here today. He was intending to, but it was only late yesterday afternoon that we were informed by counsel for the [16] Hughes Tool Company in California that the Marshal then had in his hands a

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subpoena to serve on Mr. Davis for accepting service for Mr. Hughes. He did not learn until close to six o'clock that was in fact the case, and he made himself at that time available, assuming in so doing that he [be] would doing exactly that which TWA had been seeking or at least which it claimed to have been seeking, and which was to see to it that service was in fact effected.

With respect to the date of September 24th, I would like to point out to your Honor that the notice of taking deposition does mention the 24th day of September, and then goes on to say, as indeed I believe it must under the order of your Honor as well as the order of the Special Master, or such other time or place as may be fixed by order of the Court or by agreement.

Mr. Hughes is not scheduled to be reached for deposition until some time after the Tool Company has had an opportunity to complete the discovery in which it is now engaged.

I doubt now merely by filing a new notice and making a whole lot of unfounded charges that TWA could conceivably be permitted to interrupt that [17] schedule or interrupt the Hughes Tool Company's discovery in that fashion.

The Court: How is the deposition of Mr. Tillinghast proceeding?

Mrs. Lea: The deposition of Mr. Tillinghast has been completed. The Hughes Tool Company is now deposing the next TWA witness who is Mr. Leslie. Because of the problem of personal privilege of Mr. Leslie, we are going to be examining Mr. Rummel next week.

We are proceeding with the depositions fixed in your Honor's schedule as rapidly as we can. We are in the midst of our discovery.

Transcript of Pretrial Hearing, September 6, 1962

The Court: How long is that going to last? I had the impression once you got through with Mr. Tillinghast that you would move quite rapidly.

Mrs. Lea: We will certainly do our best to be as expeditious as we can. How long it will take, I cannot tell you, I just do not know.

The Court: I think, Mr. Sonnett, you may be advised to make an application to the Special Master, if you think it is necessary and proper, that the completion of the examination by the Hughes Tool Company by TWA may be suspended in order to proceed [18] with Mr. Hughes on September 24th.

Mr. Sonnett: Yes, your Honor.

The Court: Frankly, I am very much interested to see if Mr. Hughes is going to show up in view of all the charges thrown back and forth here.

Apply to the Special Master. If the Hughes Tool Company is dissatisfied with the ruling of the Special Master, they may appeal this ruling to me.

Mr. Sonnett: Yes, sir, we shall do so promptly.

The Court: You may have until September 17th to file a reply to Mrs. Lea's affidavit which is due September 13th.

Mr. Sonnett: I trust the affidavits to be submitted on behalf of the Hughes Tool Company will be affidavits by those people who participated in the preparation of the document, not hearsay by counsel, we have had too much of that.

The Court: We will judge the affidavits when they are submitted.

Mr. Sonnett: Yes, your Honor.

(Adjourned sine die.)

Affidavit of John F. Sonnett, September 14, 1962

[1765]

[CAPTION]

STATE OF NEW YORK }
COUNTY OF NEW YORK ss.:

JOHN F. SONNETT, being duly sworn, deposes and says:

1. I am a member of the firm of Cahill, Gordon, Reindel & Ohl, counsel for Trans World Airlines, Inc. ("TWA"), and I am familiar with the proceedings had in this matter.

2. This affidavit and the accompanying exhibits are submitted in support of the motion of TWA for an order:

(a) that TWA may commence taking the deposition of Howard R. Hughes in New York on September 24, 1962 [1766] and continue such deposition from day to day until completed,

(b) directing that defendant Hughes Tool Company ("Toolco") produce Hughes at that time and place for the purposes of such deposition, and

(c) suspending the taking of depositions by Toolco from September 24, 1962 until the deposition of Hughes is completed,

and in reply to so much of the affidavit of Chester C. Davis sworn to September 13, 1962 (hereinafter the "Davis Affidavit") as purports to discuss the foregoing motion.

Affidavit of John F. Sonnett, September 14, 1962

3. The basis for TWA's request that it be permitted to go forward with the deposition of Hughes commencing September 24 has been made a matter of record in numerous prior proceedings before the Special Master and before the Court. Particularly pertinent is the hearing before the Court on September 6, 1962 on TWA's motion for the entry of a default judgment against Toolco based on Toolco's deliberate and wilful failure to answer interrogatories as to Hughes' whereabouts, and the proceedings in connection with TWA's earlier motion for an order that Rule 4 of the new Civil Rules of this Court should be applied in this case. TWA believes that the Court, on the entire record to date, has concluded that TWA should proceed with the depo- [1767] sition of Mr. Hughes on the 24th. and accordingly that no useful purpose would be served by repetition of the points which TWA has previously made.

4. A substantial part of the Davis Affidavit is devoted to an expression of Mr. Davis' views as to the merits of the present action. See, e.g., pages 4-6, 12-23. This is apparently set forth in the hope that it will lead the Special Master not only to postpone beyond September 24 the taking of Hughes' deposition, but, as well, to decide that the taking of that deposition or indeed any depositions by TWA could serve no useful purpose and therefore should not be allowed to transpire. The implied suggestion that an anti-trust plaintiff should be denied the right to develop its case through depositions of the adverse party's witnesses is patently absurd. Hence Mr. Davis' attempt to confuse the issue by fragmentary, incomplete and inaccurate discussion of the merits of this litigation should be ignored.

Affidavit of John F. Sonnett, September 14, 1962

5. This affidavit is therefore concerned primarily with so much of TWA's pending motion as seeks an order directing Toolco to produce Hughes here in New York for his deposition. On September 6, 1962, counsel for Toolco (Mrs. Lea), in the argument on TWA's motion for the entry of a default judgment, advised the Court that the United States Marshal for the Southern District of California on that same day had served Mr. Hughes with a subpoena to testify as a witness in this case by delivering a copy of a subpoena to [1768] Mr. Chester Davis in Los Angeles who was authorized to accept that subpoena on Mr. Hughes' behalf.

6. The subpoena referred to was a subpoena issued by the United States District Court for the Southern District of California on August 17, 1962. At our request, a member of the firm of Gibson, Dunn & Crutcher, a law firm in Los Angeles which has acted for us in connection with this case, and which had assisted us in our unsuccessful efforts to serve Mr. Hughes personally at the Beverly Hills Hotel on August 17, 1962, ascertained from the local United States Marshal's office the circumstances of the service of that subpoena upon Mr. Chester Davis, as counsel for Hughes, on September 6. As is shown by the memorandum by the Gibson, Dunn partner, a copy of which is attached as Exhibit A, it is apparent that this service was an eleventh hour device contrived to avoid the consequences of Toolco's wilful refusal to comply with the Court's order directing Toolco to answer interrogatories as to Hughes' whereabouts.

7. The subpoena in question directs Hughes to appear and testify on September 24 at the Federal Court House in

Affidavit of John F. Sonnett, September 14, 1962

Los Angeles. It was made returnable there to comply with the provisions of Rule 45, FRCP.

8. In addition, however, the record in this matter establishes that Howard R. Hughes throughout has been and is at least the "managing agent" of Hughes Tool Company.

[1769] 9. Before discussing some of the matters showing that Hughes has been and is at least a managing agent of Toolco, it should be pointed out that Judge Metzner ruled on September 6, 1962 that the question whether effective service had been made upon Hughes was to be dealt with separately from the question whether a fraud had been sought to be perpetrated on the court through submission of an "authorization" purporting to bear Howard R. Hughes' signature which did not in fact bear Howard R. Hughes' signature (Tr. 11-12, 14-15). The first question, the Court pointed out, could best be answered by whether Mr. Hughes showed up in response to the subpoena on September 24th. It was in this connection that he suggested the filing of TWA's instant motion. Despite Judge Metzner's ruling that the two questions are to be treated separately, the Davis Affidavit lumps both matters together. The equivocal and evasive way in which the forgery is sought to be dealt with in the Davis Affidavit accordingly is the subject of a separate affidavit by me to be filed directly with the Court on September 17th as directed. A copy is hereto annexed as Exhibit B.

10. Some of the evidence in this matter which establishes that Hughes was and is at least the managing agent of Hughes Tool Company, is hereinafter discussed. It consists of:

Affidavit of John F. Sonnett, September 14, 1962

A. Sworn statements of Holliday in CAB proceedings relative to Northeast Airlines;

[[1770]] B. Communications which passed through the Hughes Communications Center at Romaine Street in Los Angeles in 1961, and which communications were produced to the CAB; and

C. Various documents produced in this case from the Communications Center at Romaine Street.

**SWORN STATEMENTS OF HOLLIDAY
IN THE CAB PROCEEDINGS**

11. From April 2d until approximately April 20, 1962, the Civil Aeronautics Board conducted hearings in Washington, D. C. in the matter of the "Toolco-Northeast Control Case", Docket No. 11620. In those hearings Toolco sought approval of certain transactions which would place it in control of Northeast Airlines. Mr. Raymond M. Holliday, a defendant in this proceeding, was called as a witness on behalf of Toolco.

12. In his written direct testimony Mr. Holliday stated "I am executive vice president, secretary and the chief financial officer of Hughes Tool Company". (Direct testimony of Raymond M. Holliday). In addition, Mr. Holliday stated that he was a member of the Board of Directors and of the Executive Committee of Toolco (Tr. 781) and.

"Q. Am I to understand that you control the Tool company?

"A. No, I don't control the Tool company, no. It is controlled by a stockholder, Mr. Hughes." (Tr. 784).

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[1771] 13. The hearing before the Civil Aeronautics Board established that the decision to acquire control of Northeast Airlines was made personally by Mr. Hughes, and that the decision was made in 1961.

"Q. Let me ask you this, Mr. Holliday. I believe you previously testified that the policy determinations by the Tool company to acquire Northeast were made by Mr. Hughes sometime in October of 1961?

"A. I don't think I said the precise time. It was in the early fall or middle summer. I don't think I testified to the time." (Tr. 1107).

Mr. Holliday then stated:

"A. Maybe this would clear this up. I remember when Mr. Stretch—well, he talked with Mr. Davis about this. Mr. Davis said is this something we can do or the Tool company can do without consulting Mr. Hughes? I said it is something I don't think the Tool company would do without consulting Mr. Hughes, and he was later consulted." (Tr. 1108)

14. The transcript of that hearing also shows that Toolco finally agreed to pay Atlas \$5,000,000 for its position in Northeast. On that subject the following took place during Mr. Holliday's cross-examination:

"A. . . . We reported the \$5 million figure to Mr. Hughes, however.

"Q. Who reported that? Was that you?

"A. I believe it was Mr. Davis and Mr. Cook, I don't know which one.

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"Q. Mr. Hughes said that was all right?

"A. I don't know whether he said it is all right. He certainly did not veto it. If he had vetoed it we would not have had the agreement." (Tr. 1206).

[1772] DOCUMENTS PRODUCED TO THE CAB.

15. The CAB hearing established that during 1961 scores of communications concerning the Northeast merger flowed through the Toolco message center at 7000 Romaine Street, Los Angeles, California, to Mr. Hughes from Messrs. Davis and Cook or from Mr. Hughes to Messrs. Davis and Cook. Copies of several of these documents are attached hereto as Exhibit C. In this connection it is interesting to note that Mr. Davis was retained as Toolco's counsel directly by Mr. Hughes and not by the officers of Toolco (Tr. 1107). One of the communications between Toolco's counsel and Mr. Hughes was read in part into the CAB record by Mr. Cook during an executive session of the hearing, the transcript of which was later made public by the Civil Aeronautics Board. The text as read by Mr. Cook follows next and amply demonstrates that Mr. Hughes personally makes the important decisions for Toolco:

"MR. COOK: [Reading from Memo to Hughes]
In my view it is impossible to apply to the situation the ordinary business standards for investment. Independently of other objectives, it is obvious that you would not invest funds in a bankruptcy enterprise.

"In an informal and confidential conference which we had with Bill Forrester, he pointed out in his opinion you can probably do better to pick

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up the Airline in a Chapter 10 Bankruptcy where you would not be saddled with completed capitalization and threat of trade creditors. Forrester would even say that in the Florida Route Case Northeast would be stronger in a Chapter 10 Bankruptcy than under Hughes control.

"Nevertheless we are quite aware you do have other important objectives which we are not free to discuss with Forrester such as the following:

[1773] "(a), exploiting the CAB proceedings to restore public favor to you and to the Tool Company. To some extent this is already being achieved,

"(b), avoiding the possible adverse publicity of a Northeast lawsuit against the Tool Company in the event of a chapter 10 receivership,

"(c), protecting the favorable possibility of employing a Northeast package as frankly inflated piece of contribution with which to effectuate a TWA settlement,

"(d), the matter of finding a home for four 880's,

"(e), protecting or restoring value to the Tool Company's \$9½ million investment in Northeast."

(Tr. Executive Sessions 234-235)

VARIOUS DOCUMENTS PRODUCED IN THIS CASE.

16. Documents produced in this litigation by Toolco likewise contain cogent evidence that Hughes was and is, by any test, at least a managing agent of Toolco. Particularly instructive are the so-called "call sheets" of Raymond

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Holliday and other documents during the year 1960 and 1961. Copies of various of these are annexed as Exhibit D. Even the most casual perusal of the instructions transmitted by Hughes shows that Mr. Hughes is not merely consulted and advised as to Toolco developments but is in fact the one who makes the decisions and advises his subordinates of them.

[1774] 17. An interesting illustration of the absolute personal control which Hughes habitually exercises over Hughes Tool Company, and which he sought to exercise over TWA, is to be found in the call sheet appearing as the first document in Exhibit D annexed, a message from Hughes to William A. Forrester, Jr. It will be noted that Hughes instructed his communicator on October 28, 1960 to call Mr. Forrester

"... and tell him that for his information that Charlie Thomas negotiated and developed the deal with Dillon Read financing plan without my authority or encouragement from me; he forced it down my throat then at a Board meeting at which time he created a coalition of my directors and turned them against me and faced me with a mass resignation of all but one of the TWA directors. I have never liked this plan; I have never been in favor of this plan; I have fought it from the very beginning and I am still fighting it and I assure you that if it is employed it will be over my dead body and if you would like to come up with any suggestions of an alternative plan or any way whatsoever by which I can avoid being forced into the Dillon Read program, I would be most grateful. It is very flattering for you to say that you don't think I have ever

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been forced to do anything and maybe there was a time when this might have been a fairly accurate statement, but I assure you it is not true today and has not been true concerning this Dillon Read program from its inception. I have fought it hammer and tong from the very first day that I ever heard of it."

18. As an illustration of the continued exercise of Hughes' absolute authority, despite his alleged resignation as president of Toolco, Mr. Holliday's call sheet for February 20, 1961, contained in Exhibit D, reveals long and detailed instructions from Hughes to Holliday regarding the handling of [1775] Toolco's Convair 990 order. Clearly these are the directions of one who is called upon to make the final decisions as to company affairs.

19. Buried in the text of the February 20th call sheet is the following illuminating statement by Hughes:

"However I obtain TWA's acceptance to this is my own problem; most likely HTCO will control TWA when the matter comes up."

20. Although the above quoted testimony before the CAB and the document appended hereto by no means contain all of the evidence demonstrating that Hughes is Toolco's managing agent, they are sufficient to establish that fact beyond doubt. They show that Howard R. Hughes exercises absolute domination and control of all major decisions by Toolco in the field of commercial aviation. They compel agreement with the observation by the CAB's hearing examiner in the Toolco-Northeast control case that:

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" . . . I think that we should quit kidding ourselves to believe that Toolco is some other entity besides Howard Hughes." (Tr. 1085).

(Sworn to by John F. Sonnett on September 14, 1962.)

[fol. 1778]

EXHIBIT C TO AFFIDAVIT

MEMO NO. 673—September 11, 1961—11 A.M.

TO: HRH
FROM: Chester C. Davis
SUBJECT: Atlas-NEAL

Stretch and Austin will see the Chairman of the CAB about 4:30 P.M. this afternoon NYC time for a preliminary discussion. They anticipate that he will want to know whether a deal has in fact been traded or at least whether the parties are so close that a deal is certain if we get necessary indications from CAB. The banks are also inquiring as to whether the parties are close to a deal. Stretch is pressing me for an indication. I have indicated that his proposal is in the ballpark but I have not yet indicated the area or range which we would be willing to pay if everything else is satisfactory.

I do not need to commit myself now on an exact price. I have in mind also the possibility of trading price against time for payment which would give us an opportunity to realize full value for TWA's securities that might be used. I do not need to know, however, the area or range of price which would be satisfactory to you. There is no normal standard for placing a value on the interest of Atlas in NEAL. CAB may also inquire as to our attitude toward a possible merger of NEAL into TWA.

[fol. 1779] I should talk to you as soon as possible. In any event, I urgently need a message from you as to the price area in which I may commit. I should have this message this evening at the latest because I expect to be in Washington tomorrow morning.

Exhibit C

[fol. 1780]

BER C 3

OPERATING MEMORANDUM 724

SEPTEMBER 17

10:00 P.M.

TO: HRH

FROM: RAC

SUBJECT: B of A Conversations

Carver referred the Northeast matter to Gordon who, after a conference with others in the bank, announced the following position for the bank with respect to your proposed transactions:

- a. The bank does not want to dictate to HRH what business decisions he should make.
- b. While therefore they cannot "sanction" the transaction, they will make certain comments.
- c. They feel that unless H receives indications from the CAB that he can rely on, he will be a "damn fool" to go through with the deal.
- d. (Blocked out)

[Handwritten notation—Relevance TB 228]

- e. HRH should not make a deal which impairs his ability to solve the Convair problem, although Gordon recognizes that it is possible that by the end of the year the HTC may become a creditor rather than a debtor.
- f. HRH should not make a deal for Northeast that would impair his chances of making a settlement with TWA; that is, he should not commit subordinated debentures of TWA in amounts to prevent their use as a part of the TWA settlement.

[fol. 1781]

- g. This acquiescence by the B of A in the Northeast transaction should not be construed as either a release

Exhibit C

of cash collateral or a commitment for additional loans but should not be considered as a turn-down.

In my opinion HRH does not need to go back to B of A to make this deal provided that he is prepared to meet the B of A's specified conditions, (Blocked out)

[fol. 1782]

BER-C-4

Copy

October 24, 1961

MEMORANDUM TO: HRH

FROM: CCD and RAC

RE: NORTHEAST

1. Stretch advises that the Chairman of the CAB will call some time tomorrow to arrange for an immediate meeting with us as representatives of Toolco for the purpose of discussing the procedures which we should consider following in light of our intentions and in view of the rapidly worsening situation at Northeast. Stretch says that the Chairman will also indicate to us that the Board is not prejudiced against the Tool Company. Stretch also says that he will be at the end of his rope by the end of the week.

2. It is increasingly clear that Northeast can be effectively helped only if Toolco is prepared to assure the overdue trade accounts that they will be paid. Shell has already insisted upon such an assurance to cover future deliveries. Vickers understandably is unwilling to give up any collateral position except as part of a program indicating that Northeast can be kept out of bankruptcy—in other words that there is a program for taking care of the trade creditors.

3. From our point of view, the giving of so-called limited assistance is likely to become unrealistic. This amount will keep increasing, particularly if an overall program reassuring the trade creditors is not developed and publicly

Exhibit C

[fol. 1783] presented. It seems to us, therefore, that in order to keep the situation under control it is necessary to consider making a deal with Atlas giving us the right to acquire their position and which would form the basis for an application to CAB for their approval as to our acquisition of control. Pending CAB approval, we probably could limit the amount of financial assistance and reasonably expect the trade creditors, particularly the more important ones, to await CAB action. The application filed with CAB, however, would have to contain in effect a commitment on the part of the Tool Company assuring the payment of trade creditors upon CAB approval of our acquisition of control.

4. It is important that we have an opportunity to discuss this Northeast situation with you before we are invited by the Chairman to see him.

-end-

[fol. 1784]

BER-C-5

September 20, 1961

2:30 A M

OPERATING MEMORANDUM NO. 738

TO: RAYMOND COOK

FROM: HRH

SUBJECT: NORTHEAST NEGOTIATIONS

Tell Cook that this thing is beginning to look completely okay to me; that there are a few items in both the memorandum and the application which I want to discuss with him before it is filed. That I will call him tomorrow without fail and discuss these matters or send him a message setting them forth. I will try to do this in time for the corrections to be made and the document to be filed tomorrow but I think that is expecting too much. I think a more realistic schedule would be the filing with the CAB on Thursday. That, however, tomorrow I will review with him fully all

Exhibit C

of these items to which I refer. I don't think these are going to give us any trouble because they are simply items which I feel must be corrected from our standpoint but nothing which I believe will cause any displeasure with Atlas or the Board.

(Blocked out)

[Handwritten Notation—Relevance Tr 147]

In other words, go ahead with the program that he has outlined to me but with the limitation that no documents will be executed or promised to be executed until I give him further approval. This is not to be construed as meaning I won't grant approval perhaps even tomorrow, but tonight I want it understood that I have not approved any documents to be executed or promised to be executed, and

[Handwritten Notation—Relevance Tr 147]

[fol. 1785]

BER C6

ABC—

MEMO 983 November 16 QIYQ 1961 10:00 AM

TO: HRH

FROM: ~~BILL GAY~~ R. Cook

RE: NORTHEAST AND LOCKHEED MEETINGS

1. Pursuant to the papers filed by Northeast with the CAB yesterday (copies of which should by now have been delivered to you) the Board will probably call a meeting either on tomorrow Friday or Monday, and by three P M today we should know which. •

2. If the hearing is called for tomorrow Chester and I both feel that I should attend with him and I will plan to do so. If it is set for Monday I will still plan to come to Los Angeles for the Lockheed meeting tomorrow.

Exhibit C

3. If the Lockheed meeting must again be delayed on this account I will arrange for Bill Gay to give Lockheed the nexessary explanations.

[fol. 1786]

BER-C-7

Memo #1015—December 13, 1961—10:30 pm

To: HRH

From: Raymond Cook

Subject: Northeast

Referring to your memorandum of December 12 (yesterday morning), we believe that it is essential that we immediately tie up Northeast with an option from Atlas along the lines of our last message so that we may control the situation. This will not prevent you from making a different and better deal along the line of a firm commitment to buy out Atlas for cash as you are now contemplating. If we do not act by tomorrow (Thursday) and tie up the situation we are afraid we will loose our bargaining position with Atlas and loose face with the CAB and publicly.

[fol. 1787]

BER-C-8

AABBCC—

October 3, 1961

5:45 AM

OPERATING MEMORANDUM 815

TO: RAYMOND COOK & CHESTER DAVIS

FROM: HRH

SUBJECT: NORTHEAST DEAL AND STRETCH

Please ask Mr. Cook and Mr. Davis to use every effort to keep the Northeast deal alive and please promise Mr. Stretch we will spend the entire evening trying to arrive at a mutually satisfactory deal.

Exhibit C

[fol. 1788]

BER-C-9

AABB—

December 14, 1961

8:00 AM

OPERATING MEMORANDUM 1016

TO: RAYMOND COOK

FROM: HRH

SUBJECT: NE-ATLAS

Raymond:

I am sure you believe sincerely in the fairness of what you propose, but when you say we can take an option at one price and then go ahead and negotiate and possibly close a firm deal at a much lower basis without the acquisition of the option having hurts us, I just do not believe that you yourself believe this.

As you know, this entire affair is being played out in five scenes and three acts in front of the CAB.

Now if we take an option at the figure you are discussing and then try to negotiate at a lower figure, the CAB will say we led Atlas down the garden path and encouragd them (by taking the option) to think we were seriously interested at the higher figure.

Please make the following firm offers for immediate acceptance:

\$3,500,000 cash for Atlas' interest in NE—no strings no conditions, no option—naturally this would assure Atlas that we have made a firm decision to save NE from bankruptcy and therefore the major asset to be derived out of the deal by Atlas would be the virtual assurance that NE will be put back into healthy financial condition and converted into a profitable enterprise for the benefit of all the NE stockholders.

[fol. 1789] I think the absolute all-out horror-filled tragedy of Atlas permitting NE to go bankrupt to the financial

Exhibit C

destruction of the stockholders is something so serious to Atlas that it would destroy public confidence in Atlas as a sound investment trust and make it impossible for all practical purposes for Atlas to continue in business.

I would expect an immediate liquidation of the company.

So this deal, in my judgement, should be viewed, not so much on how little or how much it brings in, in the form of purchase price now, but in terms of how much a skillfully managed Atlas Corporation can make for its stockholders through the coming years as opposed to how little the stockholders will realize out of an immediate forced liquidation on terms far from ideal.

I can argue the merit of this proposal, both practically and morally, going back to the fact that Odium moved into my remnant RKO Company which consisted of nothing but a nice fat bank account of \$24,000,000 plus and while hiding and concealing the fact from me, secretly acquired over 1,000,000 shares and took control of the company.

He then guided events into a merger between RKO and Atlas so my Atlas stock cost me \$6,000,000 and any depreciation since then was solely due to the management of Atlas which I never interfered with in any slightest way at Mr. Odium's request.

(The above is with respect to my alternate offer which is immediate firm (no option) exchange of my stock plus \$1,000,000 cash for Atlas holdings in NE.)

[fol. 1790] So, according to my calculations, this offer would mean the Atlas holdings in NE, a bankrupt company by everyone's admission, would cost me:

Atlas stock	\$ 6,000,000
Cash	1,000,000
HTCO advances to NE	10,200,000 plus
	A.....
Total	\$17,200,000 plus

and this is only the beginning.

Exhibit C

Heaven knows how much we will have to put into NE to save it, but a conservative guess would be \$20,000,000. Our money, not bank loans which would be on top of this.

And all of this ignores completely the very large amount of money it cost us in our G.D. transactions to arrange and make available those six 880's which everyone now complains about as being too late, but they didn't think they were worthless when we gave them to NE and when NE could not get a single jet from anybody else for love or money here or abroad. Not a jet to be had from anybody, and NE was so desperate that when Odlum first came to me he was ready to settle for one airplane diverted to NE from our deliveries in January or February. So we gave him 6 and on the best lease anybody ever got—so good Naish got fired for it—and now they are complaining that the planes were late.

Anyway our costs in connection with that deal—which were very, very heavy—are ignored in the computation I have submitted above.

[fol. 1791] If anyone wants to argue that my stock in Atlas is not worth \$6,000,000 today, there is one pretty good answer to that. Atlas management had full control of my \$6,000,000 plus and if it is not worth \$6,000,000 today, the responsibility lies only one place—Atlas—and it is from this same Atlas that we are contemplating buying NE, so I think due adjustment is owing to us.

The same answer applies if anyone wants to argue that our \$10,200,000 investment in NE is not worth that amount today.

I agree it is not worth that amount—it is not worth anything and neither is the Atlas indebtedness in NE which we are getting ready to buy.

Also, here again, any depreciation in the \$10,200,000 is Atlas' doing—we advanced the money at Atlas' urgent plea and again at Atlas' request we have kept hands off 100 percent and Atlas has managed NE without any interference from us, so any loss in the \$10,200,000 is Atlas' responsibility—and it is with this same Atlas that we are

Exhibit C

dealing and we are entitled to proper adjustment and credit.

We want Stretch as a part of this deal.

Just one thing:

The basis for the two proposals:

\$3,500,000 is a 50 percent markdown for cash—all cash now—no options—no notes—no TWA debentures—no Atlas stock.

The other proposal is based upon the following:

\$7,000,000 is taken from the figures comprising the variable [fol. 1792] option which starts at \$7,500,000 in April 1962 and slides up to \$9,500,000 by April 1963. If you extrapolate this to the advanced date of December 1964, you come up with a figure of about \$7,000,000.

If my stock is valued at my cost of \$6,000,000 plus and you add the \$1,000,000 cash which I am offering you come up with \$7,000,000 plus.

I am sure they will argue that my Atlas stock is not worth \$6,000,000. The answer to that is that it was not only worth \$6,000,000 plus in a bank in cash and correction: sentence should read: The answer to that is that it was not only worth \$6,000,000 it consisted of \$6,000,000 plus in a bank in cash and no liabilities. If Atlas, under their sole uninterfered with arbitrary management—with no obstruction or interference from me—operating in accordance with their own judgement, lost a part of my \$6,000,000 then I don't see why I should be penalized for it in this deal.

However, apart from all of the above, there is no reason why my price which I am tendering, consisting of my Atlas stock plus \$1,000,000, there is no reason why this must be worth \$7,000,000 because I assure the Atlas holdings in NE are not worth \$7,000,000—not be a long way.

[fol. 1793]

EXHIBIT D TO AFFIDAVIT

HTC ROMAINE

478

FORRESTER, Wm. A. Jr.

Fri., 10/28/60

12:30 p.m. (Per Opr) Got him on the line.

INFO They talked.

2:00 p.m. Call him back and tell him that for his information that Charlie Thomas negotiated and developed the deal with Dillon Reed financing plan without my authority or encouragement from me; he forced it down my throat then at a Board meeting at which time he created a coalition of my directors and turned them against me and faced me with a mass resignation of all but one of the TWA directors. I have never liked this plan; I have never been in favor of this plan; I have fought it from the very beginning and I am still fighting it and I assure you that if it is employed it will be over my dead body and if you would like to come up with any suggestions of an alternative plan or any way whatsoever by which I can avoid being forced into the Dillon Reed program, I would be most grateful. It is very flattering for you to say that you don't think I have ever been forced to do anything and maybe there was a time when this might have been a fairly accurate statement, but I assure you it is not true today and has not been true concerning this Dillon Reed program from its inception. I have fought it hammer and tong from the very first day that I ever heard of it.

2:30 p.m. Ans: Advised.

Exhibit D

Mon., 10/31/60

11:50 a.m. Must speak to HRH.

INFO Omit; they talked.

Wed., 11/2/60

8:20 a.m. Tell HRH I would like to talk to him. I think I've got a plan on a second problem of his which he asked me to think about and I think it will have a bearing on the first problem.

Wed., 11/9/60

12:25 p.m. (Per Holliday) Anxious to talk; at Mr. Gordon's request, Forrester is meeting with Gordon in the morning, and must talk before then.

2:15 p.m. Tell him that I have been on this deal with Crown and the Convair people this entire day and I am not going to be able to talk to him until tomorrow.

200927

[fol. 1794]

HTC ROMAINE

500

ODLUM, FLOYD

Wed., 5/24/61

INFO HRH talked to him today.

5:20 p.m. Before we could contact Mr. Forrester he was on his way home to Connecticut. We will contact him tonight and expect to see him in my apartment here before the latter part of tomorrow forenoon.

6:00 p.m. Advised HRH, call omitted (per PW)

Fri., 5/26/61

2:00 p.m. Memo #148 (Per Mr. Cox) re TWA Financing

Exhibit D

6:00 p.m. (Per Roy) Mr. Davis has indicated a number of decisions are required and I am aware the New York Stock Exchange wants certain assurances. I don't want any of this done until I consider it during the weekend.

I will be in contact with you and Davis during the weekend. I want to be sure no action will be taken, no statements made or decisions given to the New York Stock Exchange or any action taken either with the NY Stock Exchange or otherwise until I have had a chance to review these things.

I will not call you or Mr. Davis tonight so please don't wait up for my call. I will try to contact both of you tomorrow.

7:30 p.m. Ans: Advised Odlum.

Sat., 5/28/61

10:00 a.m. Memo #152—Atlas Corp, AAL's 990s, Voting Trust.

HRH advised.

Sun., 5/28/61

5:00 p.m. I want to talk to Mr. Hughes about instructions for his public relations counsel.

6:10 p.m. Advised HRH (per Roy)

201144

[fol. 1795]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Wed., 1/25/61

8:45 p.m. I am going to go on to sleep now and regarding the two matters he is handling in NYC—the meeting of the trustees and the Board of Direc-

Exhibit D

tors meeting—try to make those meetings as late as they can possibly be made in the morning.

9:00 p.m. Advised.

Fri., 1/27/61

9:00 a.m. I want to be sure that you are standing by at a telephone. I want you throughout the day in your office. I want you to be able to clear your office and to talk privately at any time.

9:30 a.m. Advised.

Sun., 1/29/61

9:30 p.m. Vic Leslie says that Counsel for TWA has advised him that TWA cannot accept #9. That they must insist on 26 and 30. They cannot accept it because it would take 90 days to deliver #9, whereas 26 and 30 each would be delivered within about 4 weeks from the time that Convair is given the go ahead.

Mon., 1/30/61

2:30 p.m. Regarding the \$5 million—we will be obligated to pay provided we do not make an amendment to the contract increasing the number of aircraft from Convair.

By letter to Hughes Tool to my attention, Convair has advised that "delivery positions for the 7 additional 600 aircraft cannot be held beyond Feb. 1, 1961 without a definitive purchase agreement."

They point out that "these delivery positions have been held since July, 1960, and have now reached a point in manufacture when very substantial orders must be placed for parts and material. It is imperative that an amendment to the present contract increasing the number from 6 to 13 aircraft be executed prior to Feb. 1, 1961. If this is not done we shall have no alternative

Exhibit D

but to bill Hughes Tool for the cost pursuant to the letter agreement and to cancel these delivery positions."

201108

[fol. 1796]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Wed., 2/1/61

3:00 p.m. HTC Co has on order 10 CJ 805 engines which TWA state are surplus to their needs even assuming that they might receive all 24 880's. Storage charges on these engines are being billed by GE but no arrangement for the payment of any storage charges has been made.

Bob Rummel advises that GE would cancel the order for these 10 engines without any cost to HTC Co and give us the right to order additional engines if a need should arise in Sep. or Oct. at the price HTC Co is now obligated to pay. This is notwithstanding that the price will increase immediately by approximately \$14,000 per engine. A cancellation of these—\$1-1/2 million obligation—would not only relieve us of the present obligation but would improve our balance sheet.

Cancel: per delivery

Tue., 2/7/61

3:30 p.m. The contract change order we sent out for the 7 600's is being returned by Convair today as not acceptable. Also, they are putting a registered letter in the mail to us today rescinding forthwith the contract for the 7 22-M's.

Thu., 2/9/61

3:00 p.m. A. 880-M Recisions: Written notice was received today from Convair rescinding the 880-M

Exhibit D

contract. No mention was made of cancellation damages, although Naish has orally stated there would be none claimed. It is the opinion of Cook and Holliday that without express agreement from Convair, HTCo will remain contingently liable for whatever damages Convair may suffer from HTCo breach. Accordingly they recommend that HTCo promptly send Convair a written ~~agreement~~ acknowledgment of the rescission notice and expressly incorporate Naish's oral waiver of damage claims.

B. Purchase Agreement for 7 Additional CV 600 Aircraft.

1. This morning Cook talked to Loomis, Gullendar and Naish in San Diego concerning primarily the necessity for a conclusion of the contract on 7 additional CV600 aircraft. (Naish regarded the 880-M problem as having already been solved.)
2. Gullendar and Naish want Cook and Holliday to come to San Diego Monday, Feb. 13, to negotiate to a conclusion a firm definitive agreement on the 7 additional aircraft.
3. The contract from which HTCo is expected to execute with respect to these additional aircraft, calls for a "down payment" of approximately \$5,800,000 and progress payments aggregating another \$4,300,000 commencing on June 1, 1961. Naish says that Convair may accept a promissory note for 60 days, but no longer.
4. Any solution which can likely be negotiated with Convair will require banking support and should be coordinated with the Bank of America.
5. Cook and Holliday recommend that prior to Monday, perhaps, Friday afternoon or Saturday morning, they be authorized to negotiate with the Bank of America on the following basis:

Exhibit D

[fol. 1797]

HTC ROMAINE

498

HOLLIDAY, R.

Thu., 2/9/61 (Continued)

(a) The 880-M contract is irrevocably rescinded without penalty on Hughes Tool Co.

(b) Hughes Tool Co. will continue to offer TWA at least 2 of the remaining 880's until its new Board and President have had a reasonable opportunity to consider and accept.

(c) The \$3,108,000 of down payment which so far remains applied to the 880 contract will be re-applied as a partial payment on the 600 contract.

(d) Convair will extend to Hughes Tool Co. credit for not less than 60 days for the deficiency of down payment on the 7 additional aircraft of approximately \$2,700,000 and for the current deficiency of progress payment on the first 6 aircraft of approximately \$2,600,000.

(e) The Bank of America would give general approval, though not a binding commitment for its financing of the final two 880's.

(f) Hughes Tool Co. agrees to obtain either a disposition of, or a mutually agreeable financing of the entire fleet of 600's prior to the date of the next progress payment due there on May 1, 1961.

(g) Negotiations with TWA and its investment bankers will be promptly commenced for a public offering of TWA subordinated debentures.

6. Naish says that no action can be expected out of TWA on either the additional 880's or on

Exhibit D

the seven 880M's until some time in March, when at the earliest TWA will have its new Board and President.

7. In the absence of contrary instructions Cook and Holliday plan to arrive in Los Angeles Friday morning.

INFO Omit. They talked.

INFO Mon., 2/13/61

See message posted to Raymond Cook at 10:00 a.m. this date.

Thu., 2/16/61

6:20 p.m. (Per RC) Have received a telegram this morning addressed to Howard R. Hughes, 2200 Gulf Building, Houston, Texas as follows: "On January 6, 1961 we duly demanded that you pay the whole amount due and payable on the \$10,664,659.39 note outstanding under your special loan agreement with us which has been past due since October 31 of last year. We have had no response from you and we hereby renew such demand and insist that the note be paid in full not later than February 24, 1961. If the note is not paid in full by that date we intend to avail ourselves of the remedies provided for in the loan agreement and to proceed promptly against you and against the stock of the Hughes Tool Company and other securities held by us as collateral for the loan. Signed, Irving Trust Company, Robert A. Kerr, Vice President." Need to talk to HRH re above. (above message should have been in red)

201110

Exhibit D

[fol. 1798]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Mon., 2/20/61

3:30 p.m. Regarding GE engines—have been advised by GE that if HTCo wants to cancel the ten excess CJ805's it must do so by Monday 2/20.

4:00 p.m. Advised.

7:30 p.m. Cancel the engines provided we have the privilege to reinstate.

Regarding the Convair negotiations: I urge as follows: Regarding the claim that I would take AAL specs for the model 600's—this is true as to the original specs and at no time have I indicated any hesitation or uncertainty concerning the acceptance of the original AAL specs. At no time did I say that HTCO would take any subsequent change orders placed by AAL without approval of same first.

Convair's argument "why obtain TWA's opinion regarding 3% of the airplanes when TWA will not accept the other 97% is completely improper for the following reasons:

It is not up to Convair to decide whether TWA will accept the so-called 97% of the airplanes. This has never been a matter for discussion. However I obtain TWA's acceptance to this is my own problem; most likely HTCO will control TWA when that matter comes up.

In any event, it is not Convair's worry; the 97% is HTCO's problem.

Now, regarding the 3%; Convair is mistaken in saying it is HTCO's fault that this matter was not resolved because HTCO failed to give deci-

Exhibit D

sions; this is an invalid and improper decision which Convair is seeking to take; for this reason we do not want these 3% of changes. We have a signed specification and that specification is the airplane we want. Failure by HTCO to accept changes ordered by AAL simply means by omission that HYCO has elected to take the airplanes without any changes and contractually unless you and R. Cook have permitted a default by failure to make payments, Convair is ~~not~~ obligated to give us the airplane in accordance with the original specifications.

If Convair says HTCO has failed to give a decision with respect to the change orders the answer is simply we failed to order the changes when offered and therefore I say again we elected not to take the changes and this is the way we want the airplane. Convair has no right whatsoever to bill HTCO for the 70 thousand dollars. HTCO demands the airplanes according to the original specifications and does not want any of the changes.

At no time have we agreed to take blanket changes by AAL or any of them for that matter and I do not want them. In other words, Convair wants an answer regarding the change orders and here it is: The answer is no regarding all change orders regarding the original specs. Quite obviously Convair wants HTCO to accept these change orders in the interest of saving Convair money which naturally results from making the HTCO plans identical with the AAL planes. If Convair went ahead and put some of these changes into the HTCO planes it was done not because Convair thought we wanted them and not because Convair was uncertain as to whether we wanted them but simply because

Exhibit D

[fol. 1799]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Mon., 2/20/61 (continued)

Convair wanted to put them into the planes and charge us for them for the simple reason that this would save Convair a great deal of money over the other route, namely, to build the planes in accordance with the contract.

I want you to recite all of the above to Convair in detail and I want you to say in spite of my feelings that this is a very bad deal for HTCO and that it is costing HTCO approximately a million dollars for changes which I do not want in the airplane. Nonetheless, in the interest of getting the entire matter resolved HTCO is willing to do the following:

Give Convair promissory notes as negotiated by you; make no other changes whatsoever in any of the contracts except the one which Convair has requested concerning the 70 thousand dollars of change orders. HTCO will accept that provision exactly as it presently exists as a result of your negotiation with Convair. There are to be, however, absolutely no other changes at this time. This means the contracts will remain as presently drafted concerning delivery. Convair and HTCO to have the following oral understanding: (Not intended to be legally binding but hoped to be morally effective) A statement of intentions that Convair recognize and negotiate and that with respect to items which may be mutually agreed deleted Convair will be reasonable in the pricing. HTCO will arrange for contract administration concerning all aircraft on order in a manner in keeping with Convair's desires either by Bew or someone else (if it is

Exhibit D

not to be Bew HTCO will make every effort to find someone acceptable to Convair and will submit his name to Convair for discussion prior to assigning him to the position).

Regarding deliveries—HTCO recognizes that present schedule is unrealistic and will sit down with Convair without delay to review proposed new scheduling taking in every way a reasonable viewpoint provided the relative slippage between AAL and TWA is as Convair represents, not disadvantageous to TWA in relation to AAL as compared to their relative position prior to slippage.

In regard to deliveries, you might point out HTCO has had long experience with Boeing, Lockheed and Martin in purchasing transport; aircraft; is well aware they rarely come out on time and that you cannot get blood out of a rock so that if the deliveries have slipped then they have slipped and there is nothing we can do about it. You might point out HTCO has never sought to cancel any one of its numerous contracts with airplane manufacturers for reasons of retarded delivery and from the best of my knowledge has never sought to cancel any airplane contract for any other reason. The best evidence of this is the fact that Convair has released us from all liability under the 22M's and we still do not want to cancel this contract and are fighting to avert its cancellation.

Regarding the informal understanding—regarding the four additional 880's; I say that HTCO desires that the contract for these airplanes remains undisturbed. HTCO will notify Convair promptly of the disposition of the airplanes. HTCO has offered the four airplanes to TWA. If TWA does not take them HTCO will notify Convair promptly of what is desired to be done with these airplanes. In any event, in accord-

Exhibit D

ance with Convair's last proposal HTCO does not make any commitment at this time to Convair in any way affecting these airplanes either for cancellation or otherwise and they are not

201112

[fol. 1800]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Mon., 2/20/61 (continued)

allocated to TWA; nor are any other unallocated airplanes to be allocated to TWA until TWA makes at least a satisfactory oral agreement with HTCO with respect to these four additional airplanes.

Regarding the 22M's HTCO is aware that Convair contends that Convair is no longer obligated contractually to HTCO with respect to these airplanes. HTCO does not consent to or acquiesce to this position by Convair but at the same time Convair does not change the documents to be signed at this time or desire anything toward reinstatement of the 22M contract.

However, HTCO will appreciate very much indeed Convair withholding for as many days as is humanly possible any action toward destruction of these aircraft—or commitment to anyone else concerning them as HTCO is making an immediate all-out effort for TWA to accept these aircraft; taking all measures toward this objective and HTCO has confidence in this respect in spite of Convair's apparent receipt of information tending to indicate that TWA is not interested in these airplanes. In addition to this HTCO is approaching certain bankers immediately as to the possibility of obtaining financing for the purchase of these aircraft independent of any possible disposition to TWA. HTCO is determined to purchase these aircraft; does not

Exhibit D

want them destroyed or disposed of to others under any circumstances. HTCO will make a most determined effort to satisfy Convair immediately of HTCO's determination and financial ability to accept and pay for the aircrafts promptly *fulfilling* its obligation in regard to these airplanes without delay.

In summary, you could point out to Convair that the settlement HTCO is proposing would give Convair everything that Convair wants in regard to revised specs and an additional \$70 thousand dollars added to the price of each model 600 airplane and would put HTCO completely at the mercy of Convair in regard to any adjustment of this matter. I consider this concession completely and utterly unfair but I am proposing it as an indication that we want to give and take and we are therefore placing ourselves at Convair's mercy in respect to the adjustment of this matter if Convair should ever decide in Convair's own arbitrary judgment to condescend to make any judgment.

Also, it should be noted that with respect to the seven 22M's, which we so urgently want, again we would be completely at Convair's mercy in regard to any hope of obtaining these airplanes inasmuch as under the proposal I am making no new papers would be signed concerning these aircraft and therefore Convair's present written notice of cancellation would stand unchanged and in full effect.

Make full use of and emphasize most strongly with respect to the two points below: (a) the revised specs and \$70 thousand of additional price; (b) cancellation of the seven 22M's to HTCO—we would be completely at the mercy of Convair in any possible discussion concerning a judgment or disposition of these matters.

Exhibit D

Then point out to what extent it may seem advisable that in return for HTCO placing itself completely at Convair's mercy in respect to the above points, it seems little enough that Convair trust HTCO to sit down immediately

201113

[fol. 1801]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Thu., 3/2/61

4:00 a.m. Please take all preparatory steps necessary to be in a position to tender to the Bank of America on Friday a mortgage on the real estate we discussed. I hope to persuade the bank to accept a general description of the property in general language which will not require the taking of an inventory. Please do not actually make presentation to the bank until I communicate further with you, but please make all necessary preparations in order that we will be in a position to make this tender by Friday afternoon at the latest, as this is the deadline imposed by the bank. Many thanks, Howard.

4:15 a.m. Ans: Advised.

Fri., 3/3/61

6:00 p.m. We met with B of A this morning and they are satisfied to take the property as collateral provided the right to egress and ingress can be worked out.

We agreed that it was not the intention of you to deny the right to egress or ingress and are now developing a method by which this can be done, to wit: A mortgage on the road way with an easement back to HTCO.

With this one change the bank is completely satisfied and the paper work is being completed to

Exhibit D

provide for the mortgages which will probably be signed on Monday. In other words, unless some further question arises from B of A the matter with them is now settled until the time, or until April 20, when it will become necessary to renew the note on some long term basis.

The following TWX was sent to HTCo in Houston: "Model 880 aircraft manufacturing statements #26 and #20, were initially tendered to the HTCo on Aug. 12, and Oct. 18, 1960 respectively and upon your failure to accept delivery, were stored. Convair hereby notifies you that said aircraft #26 and #30 are being prepared for 43-tender to the HTCo for inspection and acceptance on March 8 and March 15, 1961 respectively, pursuant to an agreement between Mr. Hughes and Mr. Loomis on Feb. 15, 1961.

"You are requested to advise the undersigned immediately if the HTCo or TWA as assignee of HTCo will, after inspection, accept the aircraft on the date indicated. In connection with the foregoing, your attention is invited to the provisions of Article #2A5 of the purchase agreement between HTCo and Convair dated Sep. 10, 1956, signed, Convair by D. H. Diggs for C. L. Meador."

I received in my office in Houston a letter from Convair dated Feb. 27, 1961, asking for prompt designation of a representative to provide administration of the 600 contract pursuant to the negotiations conducted in firming up the seven follow-on 600's.

Have met with Bautzer and am going to meet again in just a short time.

HHH Advised.

201116

Exhibit D

[fol. 1802]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Fri., 3/3/61 (continued)

5:15 p.m. OK on Bank of America. Please proceed to work it out accordingly. Regarding the ingress and egress, please be most careful on the paper work on this.

Regarding the two communications from Convair, do not do anything regarding these things until further instructions from me. I will get word back to you by Mon. morning what to do apropos these two messages delivered me from Convair. Please do not give them any response orally or otherwise. If they press you further for an answer, tell them they will hear back from us on Mon.

11:30 p.m. Advised—call cancelled.

Sun., 3/5/61

12:00 a.m. Please call Cook and say that I want both of you to leave Houston Sunday evening at the very latest. You and Cook are to come out together. I will talk to you when you get to L.A.

Tue., 3/7/61

10:00 p.m. You are to come alone to Odum's ranch tomorrow. Just you are to come out and follow all the instructions as given before concerning the meeting at the Odum ranch tomorrow afternoon.

Wed., 3/8/61

3:45 a.m. Send a telegram or however it should be done to Convair by 7:00 a.m. from Houston; to be sent by Chuck Price in the usual way. The authoriza-

Exhibit D

tion should apply to #26 only not #30 or any of the others. From a practical standpoint the result should be that #26 be delivered to TWA without any delay whatsoever. I want the designation to be carried out from a legal, practical, mechanical and documentation standpoint. The same identical way we have done the others, unless there was a defect in the documentation on the prior occasions which was disadvantageous to us, in which case, of course, I want any such defects not to be repeated on this occasion.

4:45 a.m. Ans: Advised.

3:45 a.m. Please tell Odlum when you first see him that I appreciate very much indeed the message he was kind enough to send me last night, and please tell him further that I have complied with and carried out his recommendation precisely and exactly in every detail. Also, please tell him that I appreciate very deeply his courtesy, concerning your meeting today and also the meeting he had with Greg Bautzer last night, both upon such short notice.

201117

[fol. 1803]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Sun., 3/26/61

5:15 p.m. I request that you leave for New York tonight on a very important matter.

5:20 p.m. Advised.

Wed., 3/29/61

7:00 p.m. I want you to remain in NYC because I may want you to have a meeting either tomorrow or Friday, but you can definitely get home the Easter weekend.

Exhibit D

Thu., 4/6/61

9:20 p.m. Memo #49—Letter from TWA.

Sat., 4/8/61

1:30 p.m. Memo #51—TWA Sub. Debentures

HRH Advised.

Fri., 4/14/61

1:00 a.m. Do not sign anything unless you have approval from me or from Bautzer through me. On future signatures on any letters or documents, you may take Bautzer's suggestions.

Ans: Advised.

Sun., 4/16/61

12:30 p.m. I met with Plumb yesterday and until 2 p.m. EST today and have made arrangements to make available whatever more time he desires.

201120

[fol. 1804]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Mon., 4/18/61

1:15 p.m. Regarding copy of the letter of over-subscription of debentures, please notify the people at CPW&W that we do not consent. Until further communications you must consider that this is disapproved. However, we will consider the matter and communicate again with them. Meantime, the matter is not approved.

What is the latest date on which action can be taken on this matter? Is the failure to respond reason for them to believe that the matter was approved? I want your and/or Bautzer's opinion on this. Is failure to reply construed as consent?

A-2356

Exhibit D

The date on this letter was April 12; why wasn't I notified sooner?

2:45 p.m. Ans: I will advise them directly and also get answer to the questions you mention and let you know forthwith—possibly late this evening or first thing tomorrow morning.

Wed., 4/19/61

2:30 p.m. For practical purposes we have until April 26, the day before the board meeting and stockholders meeting on April 27, because this is a matter that should be approved by the Board of Directors. Technically and legally, it could probably be approved at some date after the Board meeting and could be approved by the Executive Committee any time within one week prior to the offering, which could carry it into sometime in May, but the answer should be given for all practical purposes by April 26. It is something the company would want to approve rather than the Executive Committee. The reason the letter was not brought to your attention before was that copies were sent to me both in Houston and NYC and it just happened that I wasn't in either place.

Thu., 4/20/61

10:00 a.m. Where do we stand on the four airplanes for TWA?

12:15 p.m. Ans: I had lunch with Leslie and he said that if we wanted to make them an offer we should do so because it would have to be appraised by the Board of Directors and it would have to be before the Board meeting because at that time they would probably want to commit for some Boeings.

I don't have any new information than what I gave to Bautzer, and I know he talked to you

Exhibit D

since that time. The last thing we had was the letter Leslie sent to me and following that I had lunch with him. Leslie said they would like to have the planes but we will have to make them an offer. I did not give an offer because I felt we had a deal all along. He did reiterate, however, that they are not going to try to buy them at a distressed price.

201121

[fol. 1805]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Fri., 4/21/61

3:00 p.m. HRH advised.

Mon., 4/24/61

(HRH called Bautzer and Bautzer called Holliday, while he was talking to HRH, so Bautzer could ask questions of Holliday and then pass the answer to HRH.)

7:20 p.m. I met with Mickey West today and discussed with him his working with Tom Plumb.

Tue., 4/25/61

10:02 a.m. Memo #64—TWA Debenture Problems.

Wed., 4/26/61

9:00 p.m. Memo #68—Offer of Planes to TWA.

Omit calls—they talked.

Thu., 4/27/61

9:30 p.m. Memo #72—TWA Stockholders Meeting.

A-2358

Exhibit D

Fri., 4/28/61

4:15 a.m. Do not execute the document you are holding in Houston until you get my approval.

8:30 a.m. BG advised him.

201122

[fol. 1806]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Sun., 4/30/61

8:15 p.m. It is OK for him to go to NY if his business is in connection with the four airplanes. It is also OK for him to execute the papers he has. Go ahead and do it before he goes to NY. If he is going to NY, execute the papers in Houston, put them in an envelope to Schwab and give them to Chuck Price. Instruct Price to hold it for further instructions.

8:30 p.m. Advised Holliday, who called Schwab.

Mon., 5/1/61

4:45 p.m. Before talking with the people at TWA about the four 880's I need to speak to you. TWA, from my conversation with Leslie while Leslie was in Kansas City, will require that a written offer be made quickly.

Tue., 5/2/61

11:40 a.m. Memo #73—Payment for 600's.

4:30 p.m. Memo #74—Re Letter from Olds.

Sun., 5/7/61

4:20 p.m. I have talked to Convair and while they are not unduly upset about the progress payments, they

Exhibit D

are very anxious to proceed immediately with negotiations.

8:30 p.m. Advised.

Mon., 5/8/61

4:30 p.m. Memo #76—Progress Payments to Convair.

Tue., 5/9/61

3:30 p.m. Memo #78—TWA Debentures.

201123

[fol. 1807]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Tue., 5/9/61 (Continued)

9:00 p.m. I talked with Bautzer and he affirmed that Reed had told him that the over-subscription right to the extent that it was subscribed would go to reduce the commitment of the Tool Company.

Following my conversation with Bautzer, I called Francis Reed and he affirmed that to the extent the over-subscription right given to the minority was actually subscribed that the commitment of the Tool Company would be correspondingly reduced. Reed said that he felt that it was late but he would try, and felt confident that he could get the papers amended to provide for the over-subscription right. Reed also told me that it would be necessary for the Tool Company to give to TWA a letter assenting to an over-subscription right and will dictate a letter accomplishing this to my secretary tomorrow morning.

Omit—they talked.

Exhibit D

Wed., 5/10/61

3:50 p.m. Memo #81—Purchase Agreement on 13—600's.
Memo #82—Proposed Telegram to TWA.

Thu., 5/11/61

9:00 p.m. Prior to leaving Houston, I talked several times with Bill Forrester and the work on the project seems to be going ahead in full course. I have an appointment with Forrester at 9 in the morning and at that time the plan and mechanics for accomplishing the project will be discussed and delineated.

Omit—they talked.

Fri., 5/12/61

4:30 p.m. Memo #85—Re TWA Financing.

Sat., 5/13/61

4:00 p.m. Memo #86—Re Brandi.

Memo #87—Re Brandi.

201124

[fol. 1808]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Sun., 5/14/61

7:15 a.m. Arrange a meeting with C. Davis for later in the day.

10:00 p.m. Memo #90—Offering of Debentures.

Memo #91—Proposed Resolution.

Exhibit D

Wed., 5/17/61

7:00 a.m. Please follow carefully the recommendations of Mr. Odum and Mr. Davis.

7:30 a.m. Ans: Advised.

8:30 a.m. The TWA Board of Directors declined the Merrill Lynch plan. They voted to proceed with their own registration statement and their own offering and Mr. Davis was permitted to come into the meeting and talk to the Board of Directors and explain the position of the Tool Company. However, the matter seemed to be completely cut and dried and after having taken the action, I retired from the meeting to advise Mr. Davis of the action taken.

Mr. Davis gave me a letter addressed to the TWA Board which pointed out the risk of liability on the part of TWA and the Board members individually, etc. I gave the letter to the Chairman with the request that he read it to the Board and it was read to the Board by Mr. Tillinghast.

Following the reading of the letter, Mr. Tillinghast designated Carl Rowe, counsel for TWA, to talk to Mr. Davis immediately and Mr. Breech designated Mr. Reed, counsel for the Trustees, to talk to Mr. Davis, and that is the meeting Mr. Davis is presently attending.

Omit all calls—they talked.

Sat., 5/20/61

6:30 p.m. Memo #114—Board of Directors Meeting, HTCo.

Memo #118—Meeting with Forrester.

Mon., 5/22/61

11:45 a.m. Telegrams sent to SEC, TWA and Davis. See Memo #126.

Exhibit D

[fol. 1809]

HTC ROMAINE

HOLLIDAY, RAYMOND

Tue., 5/30/61

10:15 p.m. Please tell Mr. Davis to be sure that Mr. Odum, or anybody, does not give to the NY Stock Exchange any decision in this matter until I communicate with Mr. Davis.

10:30 p.m. Advised.

Thu., 6/1/61

4:30 p.m. Advised Holliday of message to Davis.

Fri., 6/2/61

12:15 p.m. Omit all calls—they talked.

Mon., 6/5/61

5:35 a.m. I urgently and most strongly request that the proposed press release not be made and that we not make any other press statement until further discussion. I want to put forth for Mr. Davis, Mr. Holliday's and Mr. Odum's consideration my reasons for feeling as I do. If afterwards they do not agree then I will not object further.

6:00 a.m. Advised.

Fri., 6/9/61

8:30 a.m. The minority subscription figure is \$19,037,900. It is possible that this figure might change slightly as it has not yet been certified.

11:30 a.m. Advised.

Mon., 6/19/61

3:00 p.m. Memo #225—Letter from Tillinghast.

Memo #226—Telegram to Tillinghast.

Exhibit D

[fol. 1810]

HTC ROMAINE

498

HOLLIDAY, RAYMOND

Mon., 7/31/61

1:30 a.m. HRH advised. Calls cancelled.

Fri., 8/4/61

4:30 p.m. Memo #406—B. of A. Views on Settlement Negotiations.

Sun., 8/13/61

9:00 p.m. I want to call you early in the morning, but don't wait for it—go ahead with your activities pending such time as I call you.

9:30 p.m. Advised.

Tue., 8/15/61

3:15 p.m. Memo #486—Convair 880's.

Tue., 8/22/61

7:00 p.m. Regarding Houston firm, I am not going to be able to get that to him to transmit until tomorrow morning, so just let anybody waiting up go on to bed.

7:45 p.m. Holliday advised.

Sat., 9/9/61

7:30 p.m. Have you heard from Mr. Loomis and if so, what is the report?

11:00 p.m. I haven't heard from him at all.

Fri., 9/15/61

10:30 a.m. Set up a conference call in 30 to 45 minutes between Bill Gay, Raymond Holliday and myself.

Exhibit D

[fol. 1811]

HTC ROMAINE

HOLLIDAY, RAYMOND

498

Mon., 10/2/61

7:00 p.m. Telegram from G. D.

Thu., 10/19/61

7:00 p.m. Memo #892, Re Northeast.

Fri., 10/20/61

7:30 a.m. Advised HRH of Memo #892. Call cancelled.

4:00 p.m. Memo #1028—Lockheed—Jetstar.

Tue., 12/19/61

4:00 a.m. Memo #1028, HRH advised per JH; cancel.

201129

[fol. 1812]

#330 521

HTC ROMAINE

July 19, 1961

7:15 p.m.

To: HRH

From: Raymond Holliday

The first thing that came up at the board meeting today was the approval of the minutes. I explained that I had just received the minutes; that while they might have been mailed that I hadn't received them and consequently I would abstain from voting.

Next was the approval of the Executive Committee Meetings and I had glanced at these, and the minutes of June 29, that was the authorization for the filing of the law suit. I stated that I questioned the authority of the Executive Committee to authorize the filing of the law suit because as I remembered the resolution hiring the law firm that came out of the board of directors meeting that a report was to be made back to the board by the Cahill firm. It was explained to me that there was a report made to the board but that it was oral; that a report also was made to the Executive Com-

Exhibit D

mittee on June 29 and at that time the Executive Committee authorized Tillinghast to file the law suit whenever he felt it was the necessary thing to do in his judgment. So I questioned the authority of the Executive Committee and wanted the record to show that. At that time Slack suggested that the board should at that time ratify the action of the Executive Committee. The vote was taken and I cast the only "no" vote.

Nothing else came up for some time except the approval of the 1961 financing for the Boeing purchase. When that came down for vote I pointed out that nothing had been said yet on the part of HTC Co. making a settlement which would permit this and there was a considerable amount of discussion. Mr. McCone and Mr. Hood raised some questions about it which were going into the merits of it, as to whether or not it was something that could be afforded, whether they needed the planes, and some very searching questions.

301810

[fol. 1813]

HTC ROMAINE

521

I pointed out that there were some discussions going on at that time in which the financing was an ingredient and if the board could not withhold the matter for a vote at a later time I would abstain from voting. McCone also abstained because he thought it was being acted upon too quickly.

Tillinghast made a report of his conversations with Bautzer and after he made his report I pointed out that Bautzer was authorized to make the representations he made. At that point Breech suggested that since I was also a defendant in the suit that possibly it might embarrass me and I might retire from the meeting for 15 minutes, which I did. There was no further discussion of this, and nothing also came up at the meeting that was of any particular significance. There was a lot of talk about why the company was losing money but nothing else came up for action or to be voted upon that was anything except routine.

I made a complete report of the meeting to Bautzer.

301811

Exhibit D

[fol. 1814]

HTC ROMAINE

519

OPERATING MEMORANDUM

Subject: TWA Subordinated Debentures, etc.

Date 5/11/61 - 5:00 AM

From: HH to R. Holliday

Please move ahead with all possible speed on the program to sell and pay to the HTC the proceeds thereof the entire \$111 million plus of TWA's subordinated bonds. Please consider this authority to do everything necessary to proceed with this program without delay. The directives concerning the secrecy which I gave you before may be violated as required, but no more and no sooner than necessary. Bear in mind that any market is supply and demand, and if word of availability of this enormous quantity of bonds should suddenly become known up and down the street, it might raise hell with the price. Please work in close contact with Bill Forrester (or whatever other investment brokers you decide to use). But remember, this is a tricky program and one which will require the maximum skill and attention of the very best investment brokerage brains every single minute of every day as to every single detail.

This is a big assignment I am giving you, Raymond, and if you carry it out to my expectation, the rewards and results to you will be very substantial. I would like to have before me the plan of how this program is to be carried out, but you can dictate this in the evenings when it will not interfere with your work, and I do not want to delay or hold up any slightest detail of this program waiting for me to read these plans, and I do not want you to wait one minute for any further authority or communication from me.

Regarding the warrant or right to purchase TWA stock which will be attached to the debentures, as I stated in my last message, we would like to retain as many of these warrants as possible, but if the debentures simply cannot be sold without the warrants attached, even at a reduced price

Exhibit D

(reduced by not too much more than the value of the warrant), then in that event, we will simply have to let the warrants go along with the debentures. The sale of the debentures is the primary objective and has priority over any other consideration, such as retention of the warrants.

. . .

Regarding Convair, I see no reason for you to go to San Diego. I feel confident if you call on the telephone immediately to Meador or Loomis and give them full information concerning the subordinated debenture offering, but not including, of course, our recent decision to liquidate the \$70 million plus of debentures originally intended to be held by HTC, but pointing out that beyond any doubt this offering will bring the HTC around \$20-30 million, and state to Meador or Loomis that they have the HTC's promise to start making payments to Convair in whatever amount Convair requires the very first day that we commence receiving funds from the sale of these debentures. I fully believe that if we lay this on the line, openly and honestly with Convair, so that they know there is some money

301288

[fol. 1815] forthcoming just over the horizon, I believe they will be willing to wait until we receive some of these funds, provided it does not take too long. Anyway, you can do all this on the phone and tell Meador and Loomis that you are busily engaged in this debenture program and that a trip to San Diego will only delay it, and if you point out that you probably should go immediately to New York in connection with this very matter, and if you offer to come to San Diego if they desire following this trip to New York, by which time you will have perhaps more accurate dates available, I am sure you can obtain their acceptance to this program. Anyway, please try immediately.

. . .

Regarding the letter requested by TWA concerning the forthcoming offering of debentures, copy of which has been sent to me (HRH): Please ask Bantzer and Cook each by telephone for any changes (if any) they recommend in respect to this document. Try to persuade Cook to give you his advice. Tell him I am contacting Bob Campbell right away regarding the fees.

Exhibit D

But in any event, I want this letter executed and delivered in the quickest possible time. If it is impossible to obtain Cook's comments, go ahead without them. Give Bautzer a very quick opportunity to seek counsel within his firm as some of these men might be very valuable in studying and revising this letter. In any event, I want the letter executed as quickly as possible, still to comply with the requests contained herein. Then I want it sent to New York air express, picked up at the airport and shot into Leslie by the quickest possible method of conveyance. Call Leslie immediately and say that the letter will be executed today and will be sent today and will be in their hands by tomorrow morning at the latest. Make a second call to Leslie after the letter has been executed and sent. Could be Reed if this is the man to be assured. HRH wants Leslie or Reed or both to be called and say that they letter will be executed today and will be received by them no later than tomorrow morning. HRH wants the second call to either or both of these, saying the letter has been executed and has been sent and is en route. If the letter is already in the mail, please phone them and tell them. Holliday is to decide whether it will be Leslie or Reed or both.

301289

[fol. 1816]

519
HTC ROMAINÉ

OPERATING MEMORANDUM

Date 5/11/61 - 5:00 AM

Subject: TWA Subordinated Bonds

From: HRH to R. Holliday

Please move ahead with all possible speed on the program to sell and pay to the HTC the proceeds thereof, the entire \$111 million plus of TWA's subordinated bonds. Please consider this authority to do everything necessary to proceed with this program without delay. The directives concerning the secrecy which I gave you before may be violated as required, but no more and no sooner than necessary. Bear in mind that any market is supply and demand, and

Exhibit D

if word of availability of this enormous quantity of bonds should suddenly become known up and down the street, it might raise hell with the price. Please work in close contact with Bill Forrester (or whatever other investment brokers you decide to use), but remember this is a tricky program and one which will require the maximum skill and attention of the very best investment brokerage brains, every single minute of every day as to every single detail.

This is a big assignment I am giving you, Raymond, and if you carry it out to my expectation, the rewards and results to you will be very substantial. I would like to have before me the plan of how this program is to be carried out, but you can dictate this in the evenings when it will not interfere with your work, and I do not want you to delay or hold up any slightest detail of this program waiting for me to read these plans, and I do not want you to wait one minute for any further authority or communication from me.

301291

[fol. 1817]

519

HTC ROMAINE

OPERATING MEMORANDUM

Date 5/11/61 - 5:00 AM

Subject: Regarding the warrant or right to purchase TWA stock which will be attached to the debentures.

From: HRH to R. Holliday

As I stated in my last message, we would like to retain as many of these warrants as possible, but if the debentures simply cannot be sold without the warrants attached, even at a reduced price (reduced by not too much more than the value of the warrant), then in that event we will simply have to let the warrants go along with the debentures. The sale of the debentures is the primary objective and has priority over any other consideration, such as retention of warrants.

301292

[fol. 1818]

#14
HTC ROMAINE
520

OPERATING MEMORANDUM

Subject Aircraft #26 and #30

Date March 9, 1961
4:50 p.m.

To: HRH

From: Raymond Holliday

1. Odlum recommends that HRH designate both #26 and #30, but in the event HRH will not do this, he recommends that an agreement be sought with TWA where under the designation of #26 be rescinded and #30 designated in lieu of #26 in order to give TWA the earliest possible deliveries.
2. Odlum advises HRH that HRH will make a serious mistake if he seeks to obtain an indemnity or waiver, either oral or written, in respect of the TWA law suit by using the last 20 TWA planes as a "quid pro quo" for such an indemnity or waiver.
3. Odlum states that it is his view that the TWA board of directors cannot recall the resolution ordering the investigation and that the best course of action to pursue is to offer the trustees and TWA some "sweetener" such as an option on the four 880s and some financing assistance and endeavor to have the investigation sufficiently thorough to prevent a derivative suit, but cursory enough so that only a small amount of money would be involved. He states this type of suit can be compromised and settled by agreement of the parties, whereas a derivative suit settlement would require the approval of a federal court, and further that compromise and settlement of this type of suit would provide insulation against the derivative suit.
4. Holliday recommends that HRH call Odlum since our meeting of yesterday and discuss the over-all problem.

Exhibit D

5. Holliday also recommends that HRH consider the recommendation be made to Bautzer regarding Holcomb. Yesterday Holcomb stated to Montrose that he considered Slack's speech and conduct trecherous and unforgivable and that he was so damned mad he had to bite his tongue while Slack had the floor.
6. Holliday can perhaps give HRH more background information in this regard in a telephone conversation.

301392

[fol. 1819]

(Letterhead of General Electric Company)

October 5, 1961

HUGHES TOOL COMPANY

3000 Romain Boulevard
Los Angeles, California

Attention: Mr. Howard Hughes
President

Gentlemen:

In past conversations and correspondence with your corporate management, we have endeavored to determine your intentions regarding purchase of spare equipment to support your order for thirteen Convair 990s and four remaining Convair 880s. Although thoroughly sympathetic and cooperative, your management have not been in a position at any time during the past year to commit to purchase of any engines, reversers or suppressors.

After rechecking with your management and General Dynamics and carefully reviewing various means of maintaining inventory of these items without excessive cost, we have determined that it is necessary to reallocate these items to spare parts and firm orders.

We regret this action will result in virtually no spare equipment being available at the time the aircraft are

Exhibit D

ready for delivery. However, we thought it best to advise you.

Very truly yours,

/s/ R. L. STODDARD
R. L. Stoddard, Manager
Commercial Contracts

COPIES: Mr. Raymond M. Holliday
Mr. J. G. Zevely, General Dynamics

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[fol. 1820]

Transmitted to HRH in Memorandum No. 644.

(Letterhead of Atlas Corporation, New York 5, N. Y.)

AIR MAIL

September 6, 1961

Re NORTHEAST AIRLINES, INC.

Mr. Howard R. Hughes,
7000 Romaine Street,
Los Angeles 38, California

Dear Mr. Hughes:

Since last writing to you on August 28, 1961 concerning Northeast Airlines, Inc., the following has developed:

(1) The insurance underwriters have advised us that the hull and liability coverage of Northeast will be cancelled on September 15th unless advance premiums aggregating about \$530,000 are paid prior to that time.

(2) The secured creditors are temporarily foregoing payments of interest as well as principal, but have asked for another meeting in the middle of this month to review the situation. In other words, the secured creditors are not committed beyond September 15th and have advised Northeast that they expect some definitive proposal from Northeast concerning the cash situation as a condition of their continued forbearance.

The overdue trade debt of Northeast Airlines at the present time is about 4½ million dollars. On the basis

Exhibit D

of past experience, October and November are the poorest months in the Florida air traffic market. It was with these facts in mind that I indicated in my letter to you of August 17th that 4 or 5 million dollars would be required to carry Northeast through until the beginning of the winter season, after which substantial profits can reasonably be expected. However, with the cooperation of the secured creditors, and assuming the trade debt can be held in line by substantial payments thereon, it is my belief—and that of Northeast's Treasurer—that \$3,000,000 might be sufficient for this purpose.

350001

HTC ROMAINE

[fol. 1821] After discussing the matter with Mr. Holliday, I conferred with one of the senior officers of Manufacturers Trust Company as to whether Manufacturers Trust Company would be willing, assuming Hughes Tool Company desired so to do, to guarantee a loan of approximately 3 million dollars from the Trust Company to Northeast Airlines. I was advised today by the Trust Company that as a matter of principle it would be happy to do business with the Tool Company along the lines suggested, provided, of course, that sufficient financial data concerning the earnings, assets and liabilities of the Tool Company were made available to justify a normal commercial loan.

Since my last letter to you I have also been informed from sources in which I have complete confidence that the CAB would approve a transaction of the character above mentioned. As a matter of fact, Mr. Hughes, I have been informed from the same source that it appears quite likely that as an alternative to the collapse of Northeast Airlines, the Board would entertain favorably a proposal whereby the Hughes Tool Company acquired outright control of Northeast Airlines through purchase of the Atlas interests in the airline on condition, of course, that the Tool Company would provide Northeast Airlines with the necessary working capital to assure its financial integrity. Atlas Corporation would be willing to entertain such a proposal from you on fair terms as the best and the quickest means

Exhibit D

of resolving a complicated and difficult situation for all concerned. It could well be that if this matter were presented soon enough, the question of the Atlas-Hughes Voting Trust could be resolved expeditiously and in a way which would terminate that problem favorably from a public standpoint.

I hope that you have had an opportunity to read the material I enclosed with my letter to you of August 28th because I believe this shows pretty conclusively that Northeast's future is assured if the immediate financial problems can be resolved.

Unfortunately, time is extremely critical. The insurance premiums are due eight days from today. Even if you were to provide a solution to the problem, it would still be necessary to present the matter to the CAB.

Since the Tool Company and yourself together have the largest stake in the Northeast/Atlas situation, bankruptcy or receivership of Northeast would probably have a greater impact on you—both directly and collaterally as it might affect your other interests—than on anyone else. On the positive side, it is my sincere belief that prompt and appropriate steps by the Tool Company could form the basis of a successful and rewarding venture.

Kindest regards.

Sincerely,

/s/ DAVID STRETCH

350002

[fol. 1822]

August 17, 1961

TO: MR. BILL GAY, ET AL.

In view of the critical and urgent nature of the attached letter to Mr. Hughes, I would appreciate your bringing this to his attention at the earliest possible time.

D. A. Stretch

Exhibit D

[fol. 1823]

(Letterhead of Atlas Corporation, New York 5, N. Y.)

AIR MAIL

August 17, 1961

CONFIDENTIAL

Re Northeast Airlines, Inc.

Mr. Howard R. Hughes,
7000 Romaine Street,
Los Angeles, 38, California

Dear Mr. Hughes:

A copy of the TWA complaint in the New York Federal Court action was recently forwarded to me by Mr. Tillinghast. Since the conspiracy charges involving Atlas are prejudicial to the interests of both Atlas and Northeast Airlines and, as you well know, are completely without foundation, I called Mr. Tillinghast to request a meeting with him and Mr. Breech. The meeting was held at the New York office of TWA on August 15th and was attended by James Austin and myself for Northeast and by Messrs. Breech, Tillinghast, Leslie and Cocke for TWA.

At the meeting, I endeavoured to outline briefly facts which negated the existence of the alleged conspiracy. It quickly developed, however, that the TWA people were not interested in that discussion, Tillinghast saying that "this matter was in the hands of Counsel".

The meeting then proceeded to a discussion of merger of Northeast and TWA. Messrs. Breech and Tillinghast made it clear they were not interested. The stated reasons included the following:

(1) That TWA's cash position was not good and was likely to get worse.

(2) That under existing circumstances neither the TWA Board nor the banks or insurance companies could be expected to approve a merger which involved further problems.

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(3) That the principal officers of TWA were heavily involved in TWA's existing problems, including particularly the Hughes litigation, so that they had no time to devote to the matter of merger with Northeast.

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HTC ROMAINE

[fol. 1824] (4) That merger negotiations would be difficult so long as Atlas and Northeast were involved in litigation with TWA.

As you know, Atlas and Northeast formally indicated a willingness to merge Northeast into TWA in June, 1960. For a period of over nine months thereafter, Northeast kept its offer open without any action on the part of the TWA Board. During this period, Northeast did not feel it was in a position to discuss merger with any other airline.

As I believe you are aware, Northeast's present financial condition is very critical and Atlas is not in a position to provide additional funds. In view of this and of the action of the TWA people, the possible alternatives open to Atlas, would seem to be:

- (1) To sell its Northeast holdings to a third party on the best terms possible, or
- (2) To negotiate a merger of Northeast with another carrier and as part thereof arrange for interim assistance.

I know of no prospective buyer of Atlas' holdings in Northeast. With respect to the second alternative I have had conversations with executives of several airlines since the CAB entered its order combining a merger investigation with the route case. Merger with one or two of these would not be likely to receive CAB approval, but one or two others would, I think, be feasible from the Board's point of view. Whether any of these would be in a position to help Northeast in the interim is, however, very doubtful.

In view of your substantial investment in both Atlas and Northeast, and your understanding of the airline in-

Exhibit D

dustry in general and the Northeast potential in particular, I hope, Mr. Hughes, that you will agree it is in your interest to assist Northeast in this critical period. The figures indicate that something between \$4,000,000 and \$5,000,000 will be required to carry Northeast until the commencement of the winter season. With these additional funds and the earnings from the Florida business next winter, Northeast should thus be able to operate successfully through the period of the CAB hearings. I recognize that a further loan would no doubt require CAB approval but in view of the serious problems facing Northeast, I believe the Board would permit the loan to be made. Short of such help it appears that Northeast will not be able to meet its payroll after another thirty days. Obviously the consequences of bankruptcy or receivership of Northeast would be catastrophic both to it and to Atlas.

Despite Northeast's present condition, its growth in the
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[fol. 1825] first six months of 1961 has been by far the largest of any carrier in the industry and it has now surpassed National Airlines in many of the markets to Florida. Information concerning Northeast's recent operations and its future prospects are set out in a memorandum dated July 17, 1961 from Mr. Lane (Northeast's Financial Vice President) to me, copies of which I delivered to Mr. Chester Davis at the end of July with the request that he forward a copy to you.

Kindest regards.

Sincerely,

/s/ DAVID STRETCH

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[fol. 1826]

HTC ROMAINE
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OPERATING MEMORANDUM

Date May 8, 1961 (10:50 a.m.)

Subject: Four 880 documents. Opinion on the decision on the fabrics on the 13 600's.

To: Loomis, Robert (Per BG)

From: HRH

1. Bill Gay is to call Loomis and tell him that the documents on the four 880's are in the state of being completed in New York and will be sent out here as soon as the attorneys have finished with them. At the close of business last weekend they had finished them with the exception of 1-2 yet to be completed.

2. HRH wants Bill to ask Loomis if, in his opinion, the colors and fabrics to be decided upon may conform to the American specifications in as much as American has put a lot of time, study and research into this problem. They no doubt have an intelligent answer to these problems and a very good set of specifications. This is not to be taken in any way as an indication that we have any thought of offering any of our planes to American because we definitely have no such intentions. The suggestion regarding the choice of materials is made only because it seems to me that since Burk probably will not come to San Diego and we are choosing another man, it seems to me that by all odds the quickest way to get all of these open issues resolved in a hurry is to simply follow American specifications in each instance. I would like until tomorrow morning before such a decision is made. In the meantime, I would like to know Loomis' reaction to this suggestion and I would like to know what he thinks American's reaction will be but I do not want the matter discussed with or made known to American yet.

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[fol. 1827]
CAB

#71

HTC ROMAINE

520

OPERATING MEMORANDUM

Date 4-27-61 4:00 P.M.

Subject: Convair Contract

To: HRH from BG

Loomis reiterated that the offer he made on 4-1 in which he agreed to return the money that HTC put up as down payment on the 4 airplanes and absolve HTC of any further consequences as far as Convair is concerned, is still good. He said, however, that Convair does not have a buyer for the planes, and it would be their intention to offer them, and they are obligated, he considered, to offer them first to TWA, and that Convair would offer them to TWA at the same price that HTC had paid for them.

Regarding Bruce Burk and a contract representative for the 13-600's, Loomis said these decisions became more urgent every day and do affect both costs and delivery dates of the airplanes. He said that a decision must be made by tomorrow on the colors and fabrics for the interiors, and if HTC did not make the decision, it would be necessary for Loomis to make the decision himself in order for Convair to comply with the terms of the contract. He would like very much to be able to discuss the interior decision, plus the other decisions that are urgent, with you or, if you cannot, with your representative who you would have empowered to make the decision.

[Handwritten. Notation—Sent Copy to Cook 9/29/61—
(Air)]

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[fol. 1828]

HTC ROMAINE

No. 13.

520

OPERATING MEMORANDUM

Date 3/9/61 6:00 a.m.

Subject: Aircraft #26 and #30.

To: Bill Gay

From: HRH.

Call Loomis and Bew this morning. Call Loomis at 6:50 a.m. and call Bew at 7:30 a.m. Give them the following message. The agreement HRH made with Loomis concerning indemnifying him with respect to the two airplanes absolutely holds good, that we have sent them a telegram (Assuming it was a telegram. It may have been a TWX) designating #26. We did this because we thought it was the first to come through, #26 on the eighth and #30 on the fifteenth. So we went ahead and gave the designation on #26.

We are in some negotiations with Mr. Breech and it would be very disadvantageous for us if we were forced to give the designation for #30 in addition right now. The rest of the week might see the end of these negotiations and we might be quite happy to give the designation on #30 in addition to #26.

Tell Loomis it is definitely our intention to resolve our negotiations with Breech prior to the time for delivery of the second of these two airplanes. We don't want to hold it up one minute. We, therefore, would appreciate it very much if Mr. Loomis would proceed with the completion and acceptance procedures with respect to both airplanes without delay. Relying upon the promise HRH gave to him in HRH's conversation with him about the 15th of February. Having the designation in writing for one of the two airplanes and being assured with respect to the other that we will, by the time it is ready, do one of the following two things: (a) designate it in writing for TWA, (b) take delivery for it and pay for it in cash.

With this understanding we would like to delay as long as possible the time when we must either designate the second

Exhibit D

airplane or take delivery of it, yet, not in any way to retard the work, either on the ground or in the air which is being carried on with respect to either airplane and not to retard in any way the actual completion or delivery of either airplane. If, in order to accomplish this, it would be helpful for us to send Convair a telegram (it should be by the same means of communication as was used when we designated #26 yesterday) it would say "with respect to our telegram of 3/8/61 whereby reference is made therein to aircraft serial number 26, approval is hereby granted at your option for the substitution of aircraft serial number 30 in lieu of aircraft serial number 26".

With this thought Convair could go ahead and make delivery of whichever plane is completed first and thereby we could delay until the time when the second airplane is completed and ready for delivery, the designation with respect to that airplane. All of this would possible only

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[fol. 1829] if Mr. Loomis is willing to cooperate fully. Also you should call Bew and obtain his cooperation on this same program. I think Bill should tell both Loomis and Bew that we are not asking them to deceive anybody or conceal any information from anyone that is entitled to have it but, on the other hand, since we do not contemplate that this entire situation will continue more than probably the balance of this week and the week-end, the less said to anybody else, particularly TWA personnel, the happier weekend it will be for all of us.

If Loomis wants this message then whoever drafted the language of the telegram designating #26 yesterday should draft this message (HRH assumes it might have been Cook but Holliday dictated it to RC). The message should be brief and say in substance exactly what HRH has indicated above unless there are legal reasons for using additional language. Do not make any explanation in the message. If sent to Loomis by Chuck Price and if Loomis wants the message then it should be sent from Houston by Chuck Price. It is OK to identify the telegram by serial number or whatever way they might want to identify it but make sure it says the same thing and that it is for our benefit.

Henley

**Transcript of Proceedings Before Special Master
J. Lee Rankin, September 15, 1962**

[Doc. 226]

[CAPTION]

61 Civ. 2324

[APPEARANCES]

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[58] Mr. Davis: I don't know whether this will help to a better understanding of the way in which Mr. Hughes operates. I vividly recall the entire conversation, actually, that I had with Mr. Hughes as a result of this forgery contention. I remember his saying to me "What are they claiming I used a machine to sign my name and once in a while change it?"

I do know—I am not disclosing any particular trade secret—that the Hughes Tool Company has been [59] developing what I understand is a very interesting machine to in effect do the work of draftsmen and mechanical things.

Somebody puts in something, and this thing goes on and apparently saves a fantastic number of man-hours.

We know, it is not a matter of record, but I think enough has been indicated on the record and disclosed that Mr. Hughes does very little writing.

I have explained why the acknowledgment that was made was made as it was—because it was not physically possible to have Mr. Hughes refer to the document itself, as the California form normally contemplates.

So far as having another affidavit by Mr. Hughes, all that would have meant is that someone would have claimed "Sure there is another piece of paper by Mr. Hughes, but that is still a forgery."

*Transcript of Proceedings Before Special Master
J. Lee Rankin, September 15, 1962*

It seems to me that the most effective way of putting an end to that was by having someone who knew Mr. Hughes say that it was not.

References to the memorandum, or whatever it is, annexed as part of Mr. Sonnett's current affidavit relating to what Mr. Hughes said or didn't say, [60] relating to this last financing, is to me quite understandable.

There is no question he resisted the insistence of the lending institutions to this voting trust, and that is a matter which is involved in this lawsuit as to the propriety of the existence—but for the purpose of this discussion we may assume that everything described in that memorandum in fact took place, and was not just a relatively normal reaction of an individual. How does that relate to a violation of the antitrust laws?

It was Mr. Hughes who made decisions, and not the corporate officers of TWA. Let us assume that. The question is somebody had to make decisions as to which aircraft is to be acquired and how it is to be financed. That is an internal corporate matter which is not within the ken of the jurisdiction of this Court.

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[98] The Special Master: Do any other counsel wish to be heard?

Gentlemen, I am ready to rule on this matter. I have given careful consideration to all of the showings that the parties have made, the arguments, and for myself I am satisfied that there was authority for the service of the subpoena.

That the subpoena is binding upon Mr. Hughes, and as I construe the subpoena, it is binding upon Mr. Hughes to

*Transcript of Proceedings Before Special Master
J. Lee Rankin, September 15, 1962*

appear on September 24, 1962, or in the alternative, as fixed by the Court at any other time that the Court lawfully orders Mr. Hughes to appear [99] in the courthouse at Los Angeles.

I feel that there is such a close connection between Mr. Hughes, as evidenced by some of the documents that I have seen, and the fact that he is the sole owner of the Hughes Tool Company, that the Hughes Tool Company is responsible for Mr. Hughes with regard to this subpoena, and its validity and whether it is an authorized act, and I advise and instruct counsel for the Hughes Tool Company to write Mr. Hughes and inform him about my construction of this subpoena, and that I will consider it an express waiver if he fails to communicate with the Court promptly and advise of any other construction of the subpoena, either as to its validity or when he should be required to appear, and if at any future time in this case Mr. Hughes should claim that the service of such subpoena was not authorized, not a valid instrument, not binding as I am construing it, I shall entertain a motion to strike the answer of the Hughes Tool Company and enter judgment against it in this proceeding.

It is very difficult for me to try to do equity to all the parties in this proceeding. Everyone claims he wants to be first.

I recognize what the Court has said about the [100] plaintiff TWA, and I am most anxious that it not be forgotten in all this dispute in our efforts to try to develop the facts in this proceeding.

For myself I think there have been conscientious efforts on the part of all counsel to try to forward these depositions in the proceedings to date.

*Transcript of Proceedings Before Special Master
J. Lee Rankin, September 15, 1962*

I have been giving considerable study to the various seminars that have been held regarding this type of case, and the recommendations by courts and counsel concerning such matters, to try to find out ideas or suggestions that I might contribute to more quickly advancing this cause, and try to reduce or end the very large expense that I recognize is going on, as well as to try to see that justice is done in this case.

I feel there is an affirmative burden and duty upon the Court, and therefore upon the Special Master, to act, to try to help to reduce the extent and cost of discovery where it can be done, and to advance as rapidly as possible, even as complicated a case as this is, to the point when it can be tried and disposed of for all the parties.

I know this is not a problem that I have peculiarly had myself, because several counsel have [101] mentioned this around the time as bothering them—whether or not other procedures could be used that might help to advance this cause, and reduce its protracted nature.

I had thought that before we completed the testimony of Mr. Tillinghast, I would be informed about the ultimate facts that the plaintiff was relying upon to support the various allegations of its complaint, which are largely conclusions of law, but do conform to the requirements of the federal rules concerning such complaints.

I did not think that with the chief executive officer of the plaintiff being deposed, we would reach a point at the conclusion where I would not know the ultimate facts upon which the plaintiff was relying to establish those various allegations insofar as they had a bearing upon a violation of the antitrust laws.

*Transcript of Proceedings Before Special Master
J. Lee Rankin, September 15, 1962*

But I did find that I was in that position. I think that has an important bearing upon what is equitable in asking testimony of principal witnesses of the defendant in this case, and when that should be required.

I therefore deny the application of the plaintiff, and each paragraph of it, because I have given [102] particular study about this matter, and what I could do to try to help to advance these proceedings, and regardless of whether on appeal my decision is upheld or reversed, and regardless of what conclusion I shall arrive at today, I want to suggest some action that I think should be taken in this proceeding.

For some time I have been thinking about our progress with this case, and I believe we are reaching a point where it will be expedited by Rule 16 and other procedures, under the rules, which I shall refer to hereafter.

I consider that we may profitably continue with the deposition of Mr. Rummel this next week, but at the close of our session on September 21st, I shall interrupt the sessions for the taking of depositions under Judge Metzner's prior order in this proceeding, of July 21st, as I recall it, until October 1, 1962, at 10:00 a.m.

I invite any and all counsel during the week of September 24th to apply to Judge Metzner for a pre-trial conference, and ask that he enter a pre-trial order in this case covering in his judgment and discretion the following:

1. Either that he hold hearings, and as a [103] result thereof enter a pre-trial order defining and limiting the legal and factual issues in this case as to the complaint and answer, or in the alternative, that he authorize and direct the Special Master to make a full and complete inquiry with

*Transcript of Proceedings Before Special Master
J. Lee Rankin, September 15, 1962*

regard to such issues, and report to the Court with recommendations for the form and terms of such an order and the grounds and basis for any such recommendations.

2. That if the Court appoints and directs the Special Master to recommend such an order, that in addition to the authority granted to the Special Master under prior orders, he be authorized and directed to make the following inquiries of the plaintiff and the defendants regarding the complaint and answer, and concerning the counterclaims and answers to the counterclaims at some later date, but prior to the time depositions in defense of prosecution of the counterclaims are begun.

a. A statement by counsel for plaintiff, either orally or in writing at the option of the Special Master, of each and all ultimate facts and the witness or witnesses who they expect to testify thereto, as to each paragraph of the complaint.

b. Agreements or disagreements by defendants [104] with each of such claimed ultimate facts.

c. The same procedure to be followed as to each paragraph of the answer and later, as indicated, as to the counterclaims and the answers thereto.

d. Any proposed findings of fact that the Special Master may require from the parties, and comments on opposing parties findings.

e. Exploration in detail as to the extent that the facts may be stipulated by the parties and admissions of fact that can be obtained and the agreement to such stipula-

*Transcript of Proceedings Before Special Master
J. Lee Rankin, September 15, 1962*

tions in writing and the definition of the precise areas of factual dispute.

f. Periodic reports to the Court by the Special Master of the progress being made with such responsibilities.

g. A right of review by the Court as to all recommendations of the Special Master and also as to any definitive orders or rulings under such a direction or by application of any of the Federal Rules by the Special Master.

h. Depositions to be interrupted pending completion of such authorized action and then resumed in accordance with the Court's prior orders after the pre-trial order is entered.

[105] Should no counsel make such an application, as suggested, to the Court by the close of the day on September 26, 1962, the Special Master shall approach Judge Metzner and request that he take such proposed action in order that this case be properly expedited.

Mr. Sonnett: May I inquire as to a point of clarification, Mr. Rankin? In that portion of your ruling where you found that there was authorization to accept the subpoena returnable the 24th, and that it was a valid service, am I correct in my assumption that you are not ruling upon the matter whether there was a forgery of the authorization, but rather that you base your ruling on other grounds in the record?

The Special Master: I am not making that ruling, because I feel that is before the Court, otherwise I would.

Mr. Sonnett: That is the point I wanted to clear on the record.

*Transcript of Proceedings Before Special Master
J. Lee Rankin, September 15, 1962*

The Special Master: Are there any inquiries thus far?

Mr. Davis: Off the record.

(Discussion off the record.)

Mr. Sonnett: Further by way of clarification, and my own understanding, Mr. Rankin, I take it from [106] your ruling that you have not directed any alteration in the date of September 24th under the subpoena?

The Special Master: I meant to rule on that, that Mr. Hughes would not be required to appear on the 24th, but he would have to be held in readiness to appear whenever the Court would order him, should Judge Metzner order him to appear on the 24th, despite my ruling, or at any later date in the proper order as the Court may determine that he should be reached—either the Special Master or the Court.

In that regard, following the order of Judge Metzner of July 21st, but I read into that order a further position of Judge Metzner that should these depositions at any time be considered to be not progressing in such a way that they should be interrupted in order to permit TWA to proceed with its depositions, that power is inherent in the Special Master and the Court, and is expressly reserved.

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[181] The Special Master: I will incorporate in my direction to counsel for the Hughes Tool Company the order that if Mr. Hughes does not accept the interpretation I place upon the subpoena, and the authority for service of that subpoena, and the requirement to produce documents under it, that he so inform the Special Master by Friday of next week.

*Transcript of Proceedings Before Special Master
J. Lee Rankin, September 15, 1962*

I am imposing that responsibility for giving that notice upon counsel for the Hughes Tool Company, because I am piercing the corporate veil as to the Hughes Tool Company, and I am bringing what I hope is clear notice of very substantial sanctions, not against Mr. Hughes, but against the Hughes Tool Company, in case there should be at some later date a claim of lack of [182] authorization or failure to respond to the subpoena because of any such claims, either as to personal appearance when the Court would order, or as to the production of documents.

I am not directing that counsel obtain an answer from Mr. Hughes. If I don't receive one by Friday of next week, I have told you plainly, I hope, the construction I am placing upon the action in the failure to receive any, and the sanctions that are indicated as far as the Tool Company is concerned.

I do ask you to bear with me in giving that notice to Mr. Hughes, so there will be no question about his opportunity in view of his interests, both personally and in the Tool Company, to take exception to the interpretation placed by the Special Master on this matter, if he sees fit to do so.

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[fol. 2011]

[File endorsement omitted]

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
61 Civ. 2324**

TRANS WORLD AIRLINES, INC., Plaintiff,

VS.

**HOWARD R. HUGHES, HUGHES TOOL COMPANY and
RAYMOND M. HOLLIDAY, Defendants.**

Before: Hon. Charles M. Metzner, District Judge.

Transcript of Proceedings—September 19, 1962

[fol. 2012]

APPEARANCES:

**Mr. Davis, Mrs. Lea, Mr. Cook, Mr. Cox, Mr. Sonnett,
Mr. Bromley, Mr. Stewart, Mr. Kaminer, Mr. Hupper,
Mr. Barr, Mr. Bradner, Mr. West, Mr. Harrell, Mr. Tenney.**

The Court: Mr. Sonnett.

**Mr. Sonnett: May it please the Court, if the Court
doesn't hear me I wish to be advised that I practically lost
my voice. I will do my best.**

**The basic position which I would like to advance to the
Court today is that on the basis of the entire record to
date the Court should direct that TWA may proceed with
the deposition of Howard R. Hughes Monday in Los An-
geles pursuant to the subpoena issued from that court and
that should be done whether or not the depositions cur-
[fol. 2013] rently being taken here continue or are sus-
pended.**

**The special master has ruled, as your Honor has noted
from the record, I am sure, that Hughes is bound person-
ally by the adoption, authorization, ratification or whatever**

Transcript of Pretrial Hearing, September 19, 1963

it was that he did in respect of a personal appearance at some time. The question of the forgery we believe to be perpetrated and the attempted fraud on the court expressly has not been passed upon by the master, that being before your Honor.

The reasons why we think that TWA should be permitted to go forward now in respect of the Hughes deposition are that the depositions have been in progress since early this year. We have had a total, I believe, of nine pre-trial conferences with your Honor. This will be the tenth, according to my count, since this case was assigned to your Honor for all purposes.

Without attempting to review the prior history of any of those which your Honor certainly has clearly in mind, it was clear beyond any doubt in July at a hearing before you, as you observed at the time, your Honor, that Mr. Hughes [fol. 2014] was obviously ducking service. It was also represented at that time that Mr. Hughes was not represented by any counsel in this case and that is still the state of the record.

The statement was made before the special master at page 179 of Saturday's transcript, in which Mr. Davis stated, "I am not appearing as counsel for Mr. Hughes. Mr. Hughes personally is not subject to the jurisdiction of this court. I did state on the record before Judge Metzner that I have and am giving advice to Mr. Hughes with respect to him individually and like all counsel act as counsel for clients to the extent to which they consult me."

Your Honor will note the following discussion and at the bottom of page 180 Mr. Davis says, "I am not appearing in this action on behalf of Mr. Hughes."

What Mr. Rankin did rule on Saturday, as I understand his ruling, was that Hughes Tool Company would be required to produce Mr. Hughes at least as a managing agent at some date to be determined.

The Court: I don't gather that, Mr. Sonnett. Point to the record where Mr. Rankin found that Mr. Hughes should be produced as a managing agent.

Mr. Sonnett: At page 99 of the transcript—commencing at page 98, at the bottom:

Transcript of Pretrial Hearing, September 19, 1962

[fol. 2015] "The Special Master: That the subpoena is binding upon Mr. Hughes and as I construe the subpoena it is binding on Mr. Hughes to appear on September 24, 1962, or in the alternative as fixed by the court at any other time that the court lawfully orders Mr. Hughes to appear in the courthouse at Los Angeles. I feel that there is such a close connection between Mr. Hughes as evidenced by some of the documents that I have seen and the fact that he is a sole owner of Hughes Tool Company, that the Hughes Tool Company is responsible for Mr. Hughes with regard to this subpoena and its validity and whether it is authorized to act, and I advise and instruct counsel for Hughes Tool Company to write Mr. Hughes and inform him about my construction of this subpoena and that I will consider it an express waiver if he fails to communicate with the court promptly and advise of any other construction of the subpoena either as to its validity or when he should be required to appear and if at any future time in the case Mr. Hughes should claim the service of the subpoena is not authorized and not a valid instrument, not binding as I am construing it, I shall entertain a [fol. 2016] motion to strike the answer of Hughes Tool Company and enter a judgment against it in this proceeding."

In another place in the record, your Honor—I shall try to put my hand on it—the Special Master stated in substance that he was piercing the corporate veil in this connection.

The Court: I had a feeling from reading the record that the Special Master was not meeting your point on a request that he rule specifically that Mr. Hughes was a managing agent. I think you have to interpret that language rather than saying that language is a holding. He did duck your direct question and I don't consider that an answer, some forty pages later to be an answer.

Mr. Sonnett: I had in mind 181 of the transcript, in which the Special Master continued as follows:

"I will incorporate in my direction to counsel for Hughes Tool Company the order that if Mr. Hughes

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does not accept the interpretation that I make as to the authority of the service of that subpoena and the requirement to produce documents under it, that he so inform the Special Master by Friday of next week. [fol. 2017] I am imposing this responsibility and giving notice to counsel for Hughes Tool Company because I am piercing the corporate veil as to Hughes Tool Company, applying what I hope is clear notice of every substantial sanctions, not against Mr. Hughes but against the Hughes Tool Company in case there should be at some later date a failure to respond to the subpoena."

Now, since your Honor has put it so clearly, I agree, I must say, that I think that what the Special Master said on this point does require some construction and I think probably that his language is a holding that Mr. Hughes is at least a managing agent of Hughes Tool Company in the sense that he ruled. But certainly he did not explicitly so state.

In any event, your Honor, in the light of the record before you, it seems to me evident that with all of the history of the efforts to find Mr. Hughes and serve him personally, with the, I believe, deliberate effort to conceal his whereabouts so that we couldn't serve him, with what I believe to be a deliberate campaign to frustrate the orders of the court in that regard which are clear and explicit, with what I still believe is established beyond doubt as a forgery and fraudulent authorization—and I would like to [fol. 2018] come to the attempted answer to that in a moment—and with the acceptance on September 6th without reservation of a subpoena calling for his appearance, that rather unusual procedure being acceptable to the marshal in California because he was supplied with the affidavit by Mr. Davis which said, "I have been authorized in writing by Howard R. Hughes to accept service on his behalf of a subpoena for his appearance as a witness on deposition in the above-entitled action."

It seems to me that in any event the action which was taken by Mr. Davis on September 6th and the action which is alleged to have been taken by Mr. Hughes on September

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11th, the so-called acknowledgment by the notary, perhaps as a matter of contract law, constitutes a ratification, and perhaps in that connection it may be binding. I don't know.

I do know that during the period from September 6th when Mr. Davis was out there for the purpose of attempting to render moot our application to strike their answer for failure to answer the interrogatories, there was ample time then to have submitted to Mr. Hughes the form, for example, of authorization that we had initially proposed which was clear, explicit, contemplated a proper form of [fol. 2019] acknowledgement and actual execution by Mr. Hughes, and so on.

Therefore I think, your Honor, that the present state of the record is unsatisfactory in the sense that putting aside for the moment the question of the date when Mr. Hughes appears or is supposed to appear, I am not clear what kind of a procedural morass we may get into if he doesn't show up.

I am not clear whether and just what would be involved in the Special Master's suggestion at that time that he would strike the answer of Hughes Tool Company and presumably direct the default judgment in our favor.

The Master apparently is proceeding on the assumption that he need not reach the question of the power of the court over the individual to require his appearance like any other individual under penalty of a citation for contempt, one of the powers the court has with respect to any individual who disobeys a judicial process.

I do think that your Honor's observation on September 6th was a correct one. The best proof of the pudding is in the eating. The best solution to this and the safest in order to avoid creating a situation of great ambiguity, is to see [fol. 2020] whether or not he will show up as directed on the 24th or whatever date your Honor directs he shall show up.

I think that that is the only way we can all be sure of the record, and if there should ever be need to apply sanctions the court is in a position to apply them.

On the question of the time as to when he should appear, in the original order which your Honor signed back in February it was contemplated that the entire deposition as

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scheduled would be completed by now. I represent to your Honor that with diligence on the part of examining counsel it could have been.

I think that your Honor will find that in examining the record here there has been an illustration of delay, stalling tactics, in the depositions, and as recently, I might add, as last Thursday, we are in the process of having the second witness, Mr. Leslie, who has been on three days, and I think we barely scratched the surface, and for reasons of business convenience we agreed to have Rommel go in.

An examination of the Rommel record, I think, will satisfy your Honor that the examination has been conducted in such a way as to make it interminable if allowed to proceed. In point of fact, whenever the witness, despite Mr. Davis' best efforts to avoid this result, gets into something of real substance in the case, Mr. Davis backs away from it. Then when the Special Master seeks to have him deal with this, Mr. Davis asserts, and I believe correctly on this point, that if you please, he will conduct this the way he wants to whether the parties like it, or, indeed, even the court likes it.

That reference I have at hand here and if your Honor will take the time to note just what is happening in these depositions in an effort to delay and stall this matter, the witness Rommel, when asked a question by Mr. Davis as to whether the witness Rommel had ever been directed not to have contact with plane manufacturers he said yes. He said that it happened by personal direction of Howard Hughes to him in respect of Douglas Airplane, Electra Aircraft and Convair 990.

The minute Mr. Davis started to receive that answer he backed away from it and sought to avoid the subject and protest was made; there was a wrangle and more of the colloquy that fills up this record, so many pages of it, and Mr. Davis then announced to the Special Master that he [fol. 2022] was going to do this his own way.

He stated at page 271 of the transcript, amongst other things, "Whether I do it"—that is, conduct the examination—"in a manner which is satisfactory or pleasing to either Mr. Williams or other counsel here or may I suggest even to the court, at this stage of the proceedings, I am entitled

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to my discovery proceeding as I think is best designed to develop the facts in a manner which I can understand."

Now, the Tillinghast deposition dragged out interminably. When it is realized that Mr. Tillinghast was president of TWA for only a few short months when this case was filed, and when it is recognized how many, many weeks were taken on this deposition, it seems to me that it is a clear case there of delay beyond all reasonable bounds.

Your Honor will recall that in an effort to deal with that we had some pre-trial conferences and we urged that the only sure cure for this was a program of alternating or concurrent depositions. Your Honor directed at one point Mr. Davis should suspend his efforts to examine in either of the so-called counterclaim and get the case moving forward, and several times we have stated that we wished that the case would progress more rapidly, and indeed it [fol. 2023] should because the financial problems continue and the problem of a trial date is a very important matter to this airline.

At this rate, if we were just to forecast the rate of progress based on what happened to date in the deposition program, Mr. Davis would be at this for another year or two beyond a doubt.

I think that when the Hughes Tool Company initially represented that a deposition program, by the submission of dates they contemplated a couple of weeks for witnesses and so on, and it was possible that they were perhaps a little optimistic.

On the other hand, what they have done far exceeds any representation that they ever made to the court in any way about the length of time they would need.

I think that the needs of TWA to prepare its discovery, particularly in respect to Howard R. Hughes, is acute. Hughes, as your Honor will see from the record before you, is the one man who knows the whole story.

Annexed to our papers are extracts from his call messages, his directions to people as to how to do this and how to do that, both before and after December of 1960, that [fol. 2024] same exercise of absence of dominion and control in respect of aircraft that characterized the situation for years.

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He is the one who knows best the extent to which the motivations for what we think are plain violations of law, were tax motivations. I think that when we take his deposition we could decide at the end of that whether TWA is going to need another twelve witnesses or another two witnesses or maybe no witnesses before it would be ready to ask your Honor to fix a trial date.

We have had Noah Deatrick, for many years the chief lieutenant of Mr. Hughes. Deatrick is around seventy. I don't know how much longer—nobody knows how much longer Mr. Deatrick is going to be around.

Take Mr. Hughes himself. I know nothing about this man's health except what I read in the public press, but I think that the failure to have his evidence as a matter of record for use in this case would be a tragedy.

So, your Honor, it seems to me that consistent with the history of the case, the amount of time that you have allowed them, the approach by Rule 4 of concurrent depositions, the fact that they can do concurrent depositions—[fol. 2025] they have very distinguished counsel in addition to Mr. Davis—they have Mr. Cook recently take a deposition—it seems to me that the only way to really move the case along is a program of concurrent depositions.

I therefore strongly urge your Honor to consider that and to direct it before the evidence escapes us for all time, perhaps: To get it reduced to question-and-answer form under oath.

I don't believe that on the forgery aspect, unless your Honor has any question, that I need to go beyond what is in my reply affidavit which I filed with the court Monday.

I submit to your Honor that nowhere has anyone asserted yet, hearsay or otherwise, that Howard Hughes personally signed the document which is said to be an authorization.

The Court: How do you interpret those words that were used in Anderson's affidavit of acknowledgement, in which he says, "Said Howard R. Hughes further acknowledged to me that he confirms such authorization to Mr. Davis in a writing to me as follows:"?

Mr. Sonnett: I interpret that with particular reference to the background which resulted in document of so-called [fol. 2026] acknowledgement coming into being, your Honor

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will find the Davis affidavit, Mr. Davis asked California counsel to get the California statutory form of acknowledgement of Mr. Hughes and have him execute it.

He went out there and there was a formal acknowledgement, but it is not the statutory form. There is a big difference. The California statutory form requires an oath as to personal execution of the document. That is conspicuously missing. All that we have here is that having been caught at it Mr. Hughes is willing to, by this acknowledgement procedure, try to make it look good and adopt it.

The Court: Suppose he did adopt it. You say that this doesn't even go that far?

Mr. Sonnett: I would be prepared, your Honor, to concede that if in fact he appeared before a notary public and if in fact he made the oath which it is stated he made, if that be the fact, that probably is some kind of a ratification under some principles of contract law. But I know of no way that the process of the United States District Court can be treated in that fashion.

In the first place, as your Honor well knows, the rule in [fol. 2027] respect of service of subpoenas, requires personal service. Therefore my initial suggestion, when much was sought to be made out of a desire to avoid embarrassing Mr. Hughes, my initial suggestion was that of his intermediates, Mr. Glen or anybody serve him personally with the subpoena and make an affidavit of service, and I would take that. They didn't see fit to do that.

That is the very first thing I suggested, trying to avoid any embarrassment. I am not interested in embarrassing this man.

The Court: You are getting away from my question. If you were in negotiation with Mr. Bromley who represented a client on the other side looking toward the settlement of a lawsuit and you wrote a letter to Judge Bromley stating that my client has confirmed to me in writing the following settlement, what do you think Judge Bromley would think if he received such a communication? Wouldn't he think that your client signed such a document?

Mr. Sonnett: I think if those were all the facts he might well, but that is not our case. If your Honor will go back briefly on the chronology, what we find on July 12th, you

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[fol. 2028] directed that interrogatories be answered. You observed, and entirely correctly, at that time that it appeared that Mr. Hughes was ducking service, and he was.

Then we find that we were back again before your Honor on July 26th in connection with an extension of time being sought by the Hughes Tool Company to answer the interrogatories.

Meanwhile apparently Mr. Davis has sent out to Mr. Hughes a form of authorization designed by Mr. Davis but never shown to us that was dated in late June. Mr. Hughes had, according to Mr. Davis—he got that form and that form was the one that tried to import into the authorization a condition that Mr. Hughes after all would be willing to appear or accept service to appear provided he was guaranteed in fact his turn at bat wouldn't come for a year while Mr. Davis took a lot of depositions. However, Mr. Hughes did not sign the Davis form.

Whoever prepared it, and I don't know who did, and whoever signed it, and I don't know, except I know it wasn't Mr. Hughes, they got a little bit of a form without a date on it, and at some point that little bit of a form was the one sent to your Honor and your Honor returned it because your Honor had questions about it, and when you returned [fol. 2029] it with a letter to counsel you stated that you expected that counsel would comply with the court's order to answer the interrogatories on August 27th.

Now, what happened? There wasn't any effort to comply with the court's order whatsoever. Instead, after we moved to strike the answer for wilful default—and I think it was wilful and aggravating—Mr. Davis hopped on a plane and rushed out there with the idea of having the deputy marshal at 7:15 a.m., California time, accept these representations so Mr. Davis can accept the subpoena and then report to you that our motion was moot because there was service?

Why the 7:15? Well, of course that strategy was that we were before your Honor at eleven-thirty that day.

The Court: You didn't state it correctly. 7:15 is 10:15 here, fifteen minutes before you walked into the courtroom.

Mr. Sonnett: Yes, your Honor, but I think Mr. Davis had a little bit of time to palaver with the marshal before the marshal agreed to accept the affidavit.

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I have the return and the affidavit, a certified copy, and [fol. 2030] that is the strategy. The strategy was not to answer the interrogatories which you had twice directed be answered and then, B, to ram down the court's throat and ours the form of authorization unsatisfactory certainly to us and presumably to the court as to form.

And then counsel making that good by getting the marshal to take it and at no time between September 6th and September 11th when this so-called acknowledgement was done—at no time did Mr. Davis get a hold of Mr. Hughes while he was in Los Angeles and ever say, "Look here, this thing is getting difficult. Sign this form and acknowledge it in regular statutory form and swear that you signed it."

He didn't do that.

What happened was after we found the forgery he decided this is serious enough for him to consent to notice it and he would therefore go through some ceremonial before a notary public and we still don't have his signature on anything. I submit to your Honor that it was a calculated program of frustration in regard to the orders of the court. I don't think that Mr. Hughes or anybody else ought to be allowed to do this, and I think that that is [fol. 2031] exactly what was done.

The Court: That still doesn't mean, by the use of the words "confirmed in writing" that Mr. Hughes is not saying that he signed that document, and I could also point out, Mr. Sonnett, when you related the background leading up to this, that you left out a preface which is that the Special Master said that there were alternative roads to follow, either Mr. Davis was to produce an authorization for him to accept service of a witness subpoena or he would direct that Hughes Tool Company answer certain interrogatories.

We have reached the point when that authorization was not forthcoming. We then had the motion before the Special Master for interrogatories and, as I recall, an appeal was taken by Mr. Davis from the Special Master's ruling on interrogatories.

So I was proceeding on the same basis the Special Master was, that these interrogatories would be answered by the date fixed unless an authorization was produced. So with

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that background, then you can go into what you have already said.

Mr. Sonnett: There is one additional element, your Honor, and that is at the beginning of this I raised the question of the uncertainty we might get into by any such [fol. 2032] procedures as those being discussed and the net of it all was the Special Master's direction that any authorization would be personally signed by Howard R. Hughes.

The Court: Mr. Hughes says, confirms that he made such authorization.

Mr. Sonnett: But it came only after proof of forgery and while that may have been enough to bind him in some—

The Court: Do you come forward with proof that a signature is actually your signature unless it has been challenged? Don't you sign things and everybody assumes it is your signature?

Mr. Sonnett: That proof has not been submitted to your Honor.

The Court: We come back to what the words mean, this acknowledgement that Mr. Hughes confirmed in writing. I assume if you used such language as I indicated before in the supposition, you and Judge Bromley were negotiating a settlement of a case in which you were adversary counsel, that if you wrote to Judge Bromley: "I have in my hand the proposal for settlement of the case confirmed in writing by my client," that Judge Bromley and you would understand [fol. 2033] that to mean that your client had signed such a document. I think that is the common understanding of those words, certainly in the legal profession.

Mr. Sonnett: It is not an understanding of an acknowledgement required, nor the words of acknowledgement required by statute.

The Court: You are going to the question that Mr. Davis represented that he was being extra careful in making sure that they comply with the California statute when in fact they did not. That is something different. We are talking about the common understanding of the words "confirmed in writing," which is what this notary public says that Howard Hughes told him.

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Mr. Sonnett: Then I think the words are not quite that clear. There is ambiguity and I think that the record establishes that this piece of paper wasn't drafted by Mr. Hughes. It was drafted by California counsel, who are familiar with the California form, and therefore knew this was a departure from the California form.

The Court: I understand that, Mr. Sonnett. Let us go on to something else.

Mr. Sonnett: I just want to make the point that the [fol. 2034] acknowledgement says that Mr. Hughes further acknowledged to me that he had confirmed such authorization to Mr. Davis in a writing, reading as follows. It doesn't say that it was a writing by him. It would have been very simple to say in a writing which I signed. It doesn't say that. It doesn't say that at all and I think this ambiguity in this is deliberate.

The Court: I will ask that question of Mr. Davis when he gets up.

Mr. Sonnett: So much on the forgery side, and what I regard, your Honor, as a wilful attempt to obstruct the orders of the court.

I think, however, regardless of that, and if the question had never arisen, I think the necessity for TWA to commence its discovery is real and acute.

The Court: What about the suggestion of the Special Master on page 102 of the transcript regarding a Rule 16 definition of issues at this time?

Mr. Sonnett: I think that the suggestion is an excellent one at the right time. I think at this time it would be idiotic.

The Court: Why?

Mr. Sonnett: Because it is impossible, your Honor, it [fol. 2035] seems to me; when we look at the pleadings you will see every allegation of consequence in this complaint substantively is denied by Hughes Tool Company. Any attempt to limit issues is going to produce only weeks and weeks of interminable conversation instead of discovery.

In the second place, I know who some of our witnesses are. I don't know how many there will be. I don't know how many more I am going to need. It may be that after the deposition of Howard Hughes I will put down Hughes will be our witness on ninety-nine per cent of the complaint.

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The Court: Aren't you in a position to formulate the ultimate facts for a pre-trial order as contemplated?

Mr. Sonnett: I think we can formulate as far as they can meaningfully at this stage of the case by the denials of the allegations in the complaint. These are allegations are factual, but the issues are clearly drawn there. The question of how much, if any, of those defendants would be willing to stipulate is something that will lead us down the garden path for many, many months.

I am prepared and will be prepared happily to join in [fol. 2036] a pre-trial application, a hearing by your Honor or the Special Master after we have had some discovery. I don't know how much discovery we are going to need. Maybe Mr. Hughes will be enough, maybe he won't be. I can't tell.

I can't emphasize too strongly that he is the one human being that the record plainly demonstrates who does know the whole story. He is the one who pulled the strings.

That is all I have.

The Court: Mr. Davis.

Mr. Davis: Your Honor, I understand that at the request of Mr. Sonnett a transcript of the proceedings before the Special Master was sent to you. Since these arguments are fairly voluminous and a burden on the Court, I have an extract which contains merely the decisions of the Special Master, and if it would assist the Court, I have—

The Court: I have it.

Mr. Davis: What has been going on in this case since this complaint was filed under seal is best described by the remarks of Judge Dawson apparently in a situation which I would have recognized as this one, although it is not [fol. 2037] identified. I found it in the 1958 Stanford University—a statement by Judge Dawson:

“When the complaint was filed the plaintiffs served notices for the taking of depositions of numerous officers of numerous defendants and for the discovery of books and records of the defendants. There was no way to determine the proper scope of depositions as to respective defendants or how much of the discovery

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sought was for legitimate trial purposes or how much was merely for the purpose of making life miserable for the defendants in order to coerce a settlement. To allow such a complaint to stand would have added to the delay and congestion of the court by requiring continuous hearings on the scope of depositions and the proper limitation on discovery. The obvious thing to do was to require the plaintiffs to clarify the issues by stating specifically the nature of the complaint of each plaintiff against each defendant."

Let me say, your Honor, that just as soon as I find the time and certainly before next week, we do intend to submit to your Honor an application in accordance with the suggestion of the Special Master.

[fol. 2038] Now first let me address myself to the constant efforts which have been made by the plaintiff TWA through its counsel to set aside or frustrate the decisions of this court with respect to the priority which was granted to the defendants in effect first by Judge Murphy and denying their application, and specifically by Judge Herlands, more specifically by your Honor when you had occasion to reconsider the matter after we filed our answer and counter-claims and when at the same time you also granted partial discovery relief to the plaintiffs by requiring the defendants to produce all documents in their possession relating to or as called for by the various schedules.

If there have been nine or ten meetings with your Honor in this case—and I don't know how many we have had—I believe that all of them were related to an effort made by the plaintiff to take the deposition of Mr. Hughes out of turn.

The situation in this case—and frankly the basis of the arguments which we had occasion to present before—we never had an opportunity to present fully to your Honor because it was always a decided question, we have a rather unusual situation here.

First of all, the jurisdiction of this court over the subject [fol. 2039] matter of the action is dependent upon the existence of facts tending to indicate that there is a question

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to be decided, as to whether or not the conduct of the defendant was in violation of the anti-trust laws.

That is the only basis for the jurisdiction of this court over the subject matter.

The complaint complies with the concept of noticed pleadings and does assert violation of the anti-trust laws—There is no question about that—by conclusions of law, by reference to the statute and by statements that you can find in decided cases but wholly unrelated to identifying the specific count, the occasions, the events, the manner how the defendants are supposed to have violated the anti-trust laws.

In most anti-trust cases, even noticed pleadings do give the defendants some idea as to what it is about, what the plaintiff is complaining about, the distribution system that the defendant has, the acquisition of a competitor and without perhaps knowing all the evidentiary details to support the complaint, in a normal anti-trust action the defendant does know or should know if he is honest, what this is all about.

[fol. 2040] In this situation when TWA is suing its seventy-eight per cent stockholder to require divestiture by the stockholder, we find it more complicated by the fact that the very acquisition was approved by the CAB not only once but—

The Court: Mr. Davis, I hate to interrupt you but you have given me that four times now. I know it by heart.

The question is whether Mr. Hughes should be deposed on September 24th or not.

Mr. Davis: In that connection we come to the conclusion, unusual as it may seem, that notwithstanding the lengthy deposition of Mr. Tillinghast when he was given repeated opportunities to describe or identify what it is the plaintiff claims took place, the conduct which is alleged to have occurred in violation of the anti-trust laws and outside the scope of the CAB authority, not only was I unable to find out what that was but I refer you to the statement made by the Special Master who listened and supervised the deposition of Mr. Tillinghast, to the conclusion of the Special Master which you find at page 101, where Mr. Rankin said:

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"I had thought before we completed the testimony of [fol. 2041] Mr. Tillinghast I would be informed about the ultimate facts that the plaintiff was relying upon to support the various allegations of his complaint which are largely conclusions of law but do conform to the requirement of the Federal Rules concerning such complaints. I did not think that with the chief executive officer of the plaintiff being deposed we would reach a point at the conclusion where I would not know the ultimate facts upon which the plaintiff was relying to establish those various allegations in so far as they had a bearing upon the violation of the anti-trust laws but I did find that I was in that position."

And that is the position of the defendant, and quite apart from any obligation that the Court may have to satisfy itself in some manner that it has probable jurisdiction over the subject matter of this action I humbly state that any principle of justice requires that a defendant be aware, be informed in some way as to what it is he is being charged with before he is required to testify.

The position and efforts that the tool company has been making ever since the complaint was filed have been to [fol. 2042] dismiss because the facts do not exist which support the jurisdiction of this court.

What has been developing is that Mr. Hughes, because of a deep personal interest in aviation and because through the tool company he was a seventy-eight per cent stockholder of TWA, he did take an active part or interest in the specifications of the aircraft being acquired, the type of aircraft to be acquired. Whether or not decisions by TWA with respect to the acquisition of aircraft or its financing should be made by a corporate officer or by a seventy-eight per cent stockholder may be a question that could be raised in some forum which has jurisdiction over those kind of actions, not here.

The Court: We have it here in a diversity action of minority stockholders.

Mr. Davis: There are none here.

The Court: It could happen.

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Mr. Davis: I meant in this action, if these are the facts they are talking about.

In spite of the portions that Mr. Sonnett referred to in the record, Mr. Rommel has testified quite clearly that Mr. Hughes actively promoted competition amongst these vari- [fol. 2043] ous manufacturers. This blind answer that I got, which I have been exploring ever since, was that it is true as Mr. Rommel eventually testified to without any prompting on my part, that Mr. Hughes, who was anxious to get as much of a competitive jump against his competitors in the airline industry, when they were working on developments or the possibility of procuring advanced aircraft, he wanted secrecy maintained and then he did not want anyone to even discuss anything with a particular manufacturer.

But the record is replete with evidence that Mr. Hughes and the tool company throughout this entire period first of all was promoting competition amongst the manufacturers, doing everything that he could to maintain a competitive position of TWA.

However that may be, my position basically is that until such time as we do find out what the nature of the claim is which is being asserted by the plaintiff, and how the exemption under the Federal Aviation Act is not applicable, we are not ready to be disposed irrespective of any other consideration.

I am not going to refer, because I am sure that your Honor is more familiar than I am with the deep thought and study which has been given in various seminars by [fol. 2044] judges of this district as well as elsewhere, that it is desirable in the so-called big case that that be done, that plaintiff when they applied to Judge Ryan for assignment of this case to your Honor—

[fol. 2045] The Court: You agree with them, don't you?

Mr. Davis: No, your Honor. I think the case will be disposed of very quickly.

The Court: It seems that anybody who would enter a counterclaim for \$365,000,000 must think it is a big case.

Mr. Davis: At that time we didn't have an answer in. In those seminars it is perfectly clear that the consensus of opinion of all concerned is that under noticed pleadings,

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even before discovery proceedings of any kind are to be entered into it ought to be developed what the contentions of the parties are. Judge Ryan tried that but counsel for plaintiff in one way or another avoided the opportunity. When he tried that, I believe that is my affidavit, I do recall quite clearly Judge Ryan suggesting to counsel for plaintiff to prepare some kind of statement, he suggested the same thing to me.

Of course I said I can't prepare a statement as to what our position is, what facts we claim until I understand the claim. Otherwise it is going to be an exercise of how much imagination I am capable of.

[fol. 2046] Well, we never succeeded in that matter. I thought at one time that through my motion to dismiss if there had been a requirement that answering affidavits be filed, and whether or not the matter came on for decision, that would force at least some kind of an issue.

The Court: Under our rules, under a motion to dismiss if affidavits are used the Court may consider that as a motion for summary judgment under Rule 56 and require the other side to answer. But as I pointed out to you at this stage of the game this Court guided by the Court of Appeals, thought that motions of this type should not be granted in this type of case at this stage.

Mr. Davis: That is correct, your Honor. Every once in a while we have a situation which I honestly believe exists here that this complaint was drawn without anybody having any facts whatsoever.

I think quite frankly I originally started out with the thought if I depose Mr. Tillinghast, even though had not lived through the period when this alleged misconduct took place, but he was chief executive officer, he decided to file [fol. 2047] the complaint, that the very least we would get out of him is a description or identification of contentions and that is where both I and the Special Master have been disappointed.

Therefore, I quite concur with the views expressed by the Special Master since that has happened, the desirable thing to do now, although I must say parenthetically if I had a little more time to complete the deposition of Mr. Rommel, I don't believe I will be able to complete it in two more

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days, I only had about six days, I think I could affirmatively establish facts that negate the possible existence of a violation of the antitrust laws but admittedly it is doing it the hard way.

The Court: Let me ask you this question, Mr. Davis:

You set up a schedule which I think was originally submitted either to Judge Murphy or Judge Herlands before the case was submitted to me for all purposes. You have indicated subsequently before me that that was merely a tentative list and by the date set forth in that list you didn't intend to tie yourself down as to the number of days it would be necessary to take for each witness.

[fol. 2048] Now, if it was even a tentative list as to Mr. Tillinghast it was so tentative as to be practically non-existent, it meant nothing.

You have now completed Mr. Tillinghast and as I understand you have Leslie and Rommel in some stages of examination.

How many more people do you have and how many more days are you going to need to complete that deposition?

Mr. Davis: Your Honor, may I respectfully refresh your recollection a little more accurately than the way I understand your statement to be?

This schedule so-called was nothing but a tabulation of notices for the taking of depositions which I had made.

The Court: Mr. Davis, I will accept whatever corrections you want to make about my recollection. I want to know about the future.

Mr. Davis: Then let me also say I have not finished with Mr. Tillinghast, I stopped because I was directed by the Court to stop.

The Court: You are finished with Mr. Tillinghast as far as his deposition on your part is concerned. You may be [fol. 2049] able to come back after the plaintiff has had an opportunity for a deposition but as far as your deposition is concerned of the plaintiff, you are finished with Mr. Tillinghast.

Now, I want to know how many more days do you need for the other persons who were noticed?

Mr. Davis: Well, your Honor, without any knowledge of what the answers are that I am going to get it is difficult

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to estimate the amount of time except it will be considerable.

The Court: What do you mean by considerable?

Mr. Davis: Let me put it this way, I don't know what the issue is yet.

The Court: You know what questions you are going to ask.

Mr. Davis: I do not.

The Court: You haven't got a general area of inquiry before you go into your deposition?

Mr. Davis: If I could do it from 1939 to date and cover all conceivable events which might have occurred, which have a bearing on the alleged violation of the antitrust laws, it is going to take a long time.

If, however, we do proceed with the suggestion of Mr. Rankin about compelling the plaintiff to identify what it [fol. 2050] is that they claim took place and more particularly who do they know who has any information with respect to what they claim took place, then I assure your Honor I will be able to dispose of those witnesses, to establish the full facts in a very short period of time.

I could then be asked I think, fairly asked the question how long do I expect to take to examine such persons in those areas. It may be that a lot of people that I have noticed are not necessary. The problem that we have, your Honor, is simply of trying to find out what it is—the only person who knows is the plaintiff—I don't know what it is they claim we have done in derogation of CAB orders. I don't know what they claim that we have done or what course of conduct we engaged in.

In one of the allegations of the complaint they said we boycotted some manufacturers. I asked that question of Mr. Leslie, if he ever heard of that.

"No, I never heard of it."

I examined Mr. Rommel and find that the TWA, the defendant dealt with every conceivable manufacturer of aircraft in the United States and abroad. So I don't know what the boycott contention is.

[fol. 2051] I think the solution suggested by Mr. Rankin is the only one, that is recognized by every seminar that I am familiar with and what he is in effect saying now, that

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we finished with Mr. Tillinghast, we haven't found out what plaintiff is claiming as result of that examination, strange as that may seem to be, and I gave the man every opportunity to tell me whatever he knew or heard of. That is the man who had access to all the officers of TWA. If he doesn't know and won't make the effort to try to find out, who is going to tell me what it is they claim?

Counsel is supposed to make an investigation but I can't examine them under the attorney-client privilege.

Mr. Rankin says in fact if we don't do it he will, let us require the plaintiff to identify what it is they claim. Then several things will happen.

First of all, you will be able to determine whether or not there is a basis for the Court assuming jurisdiction over the subject matter. I don't think that is conferred merely by the filing of a piece of paper. But it is questioned and it seems to me we will have that much more.

Then it seems to me we will now have an identify of [fol. 2052] what area needs to be explored. At that time I will be in a position to answer your question as to how many witnesses I need and if any and how much time.

My strong belief is when plaintiff is forced to do that, there ain't going to be any more lawsuit because there are no facts that he can state and identify.

The Court: You may be able to get past a motion for a dismissal in this court and still not have a lawsuit.

Mr. Davis: I have a counterclaim.

The Court: We haven't reached your \$365 million claim. We are dealing with the small \$150 million problem now.

In other words, you tell me as of now you have no way of knowing how many more days you will have to conduct your depositions?

Mr. Davis: I cannot make an intelligent estimate that would be informative to the Court absent a disclosure by TWA of the facts or ultimate facts or circumstances or events which they claim constitute a violation of the anti-trust laws; that is correct, your Honor.

[fol. 2053] The only information I got out of Mr. Tillinghast was that as to what he claims was a willful and malicious conduct, he referred documents and that issue is ready to be decided by the Court.

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The Court: Don't sit down, I am not finished. On pages 99 and 181, the Special Master directed you to advise Mr. Hughes of certain facts. Have you done that?

Mr. Davis: Yes, your Honor. I wrote a letter on Monday and enclosed the pages of the decision of the Special Master and particularly called attention to the fact that if anyone had or if he had any different interpretation he was to advise the Court by Friday.

The Court: I understand if he doesn't so advise the Court, if he doesn't show up there there will be a default entered against Hughes Tool Company. You sent him certain pages. Did you send him page 99 and 181?

Mr. Davis: Maybe I misunderstood the statement. There is no default on Friday.

The Court: On page 99 and 181 the Special Master indicated certain action that you should take with regard to notifying Mr. Hughes, the Special Master's views regard-[fol. 2054] ing the subpoena.

Mr. Davis: That has been forwarded to Mr. Hughes.

The Court: And that if Mr. Hughes fails to advise the Special Master or the Court by this Friday that he so understands that there will be a waiver, right?

Mr. Davis: That is right.

The Court: And a default judgment would be entered against the Tool Company for \$150 million.

Mr. Davis: Not unless he failed to appear when called. That is the only thing I was misunderstanding, I thought you were saying that there would be a default judgment this Friday.

The Court: Now let us get to the forgery question.

Tell me, Mr. Davis, if Mr. Hughes left his home and had gone out before a notary public and took the time to go through this acknowledgment, wouldn't it have taken less time on his part merely to have signed an affidavit to those facts before the notary public and have furnished another sample of his signature for the Court to peruse in connection with this signature affixed to the authorization?

[fol. 2055] Mr. Davis: Let me explain the problem.

The Court: Excuse me just so that the reporter has my sentence.

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And to be used to refute the affidavit of Mr. Appel attached to Mr. Sonnett's affidavit submitted to the Court on September 6?

Mr. Davis: The answer is this, your Honor:

When Mr. Hughes called me on Monday at my request he asked me if I wanted him to—what he was going to do was write a letter in his own handwriting and put a half dozen samples of his signatures for all to look at, what do they think I use a machine to sign with or something of the sort. I told him no, I was afraid if he did that all I would be doing would be raising another issue of fact as to whether the second signature was a forgery or not a forgery.

The Court: What did you gain by a notary public's acknowledgment as opposed to an affidavit sworn to before such a notary public?

Mr. Davis: The process I went through was simply this, I wanted to have—let me first say this:

As Mr. Sonnett keeps on saying, trying to keep on the facts, it is a ratification rather than the very document [fol. 2056] which I filed in this court, that is authentic. As far as that issue, there is no question of getting a new authorization, this was my problem of having an acknowledgment with respect to the piece of paper which I had filed. That piece of paper was in my possession, not in California; it was here.

When I was in California to accept service, I came right back because of things I had to do here. When I discussed with California counsel the problem of having an acknowledgment of his signature on a piece of paper that was not physically there for the affiant to say "Yes, this is it."

If we assume contrary to fact that the paper was actually a forgery, how could Mr. Hughes know about it? If you assume Mr. Hughes could know about it it precludes the concept of forgery.

What I told California counsel was to prepare something conforming as closely as possible to the statutory form of acknowledgment in California and to refer to and identify the piece of paper which I received, sign the piece of paper, it could not be there and the man in the usual form says, "I acknowledge the signature on this piece of paper as mine." [fol. 2057] That is what took place.

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It seems to me what took place is as clearcut—not a ratification, your Honor, but a confirmation that the authorization that I received was an authorization by Mr. Hughes from Mr. Hughes and that is the only question that was ever before the Court because as the record is quite clear the Special Master did give an alternative which was that either the Tool Company was to answer interrogatories or there be filed by the time those interrogatories were to be answered a writing by Mr. Hughes.

Now, either the writing that I furnished was a writing by Mr. Hughes and before the interrogatories were required to be answered or I got an authorization subsequent to that date.

So far as I was technically concerned, I am not interested in new authority, a new signature. The one important thing was whether or not the paper I received was in fact a paper from Mr. Hughes confirming in writing the authority I asked for. There was no question in my mind, I knew Mr. Hughes was aware of the writing he was receiving because we exchanged communications with respect to it.

The Court: Your affidavit says you spoke to him on [fol. 2058] September 11.

Mr. Davis: Prior to that time, your Honor. My affidavit was prior.

The Court: Did you speak to Mr. Hughes prior to September 11?

Mr. Davis: I did not have a telephone conversation with Mr. Hughes but I was exchanging communications with Mr. Hughes.

The Court: You mean by the central office?

Mr. Davis: Not through that central office, through someone.

The Court: You have no direct telephone conversation at all?

Mr. Davis: That is right but from questions being asked and his wanting to know why it had to be in writing, I knew Mr. Hughes, through the channel I was using to communicate with him ever since I have been in the case, he was aware of my request of why I needed the confirmation

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in writing. There is no question about it that this was an authorization by Mr. Hughes, a confirmation in writing. I am not interested in what means he uses to sign or who he uses to sign. I am only interested in something which is binding on Mr. Hughes.

[fol. 2059] The Court: But you have a little problem too, Mr. Davis. You were faced long before this with claims by counsel that they didn't trust Mr. Hughes and therefore wanted it in writing. And I think the Special Master adopted that viewpoint when he gave you the choice of answering interrogatories or producing a writing. So you knew that you had a person for whom you were going to represent to the Court that you were authorized to accept service for; whom neither your adversary nor the Special Master had much faith and that is why they were calling for a written authorization signed by Mr. Hughes.

When you filed with the Court a document purporting to be that and a handwriting expert comes forth and says that is not his signature, aren't you in a peculiar position?

Mr. Davis: I don't think so unless my client fooled me but he didn't. The reference I have in mind—

The Court: But didn't you understand, Mr. Davis, that after the event, after you became advised that neither the Special Master nor your adversary trusted Mr. Hughes, that when you did produce a document which was then [fol. 2060] attacked, as being a forgery, this was again saying you can't trust Mr. Hughes and shouldn't you then have gotten an affidavit sworn by Mr. Hughes before a notary public so that you would have then had a document which was complied with, whether the original authorization had been acknowledged before a notary public, in an independent swearing?

Mr. Davis: If I followed the Court's suggestion I would be technically in default because I received another piece of paper, whether it was an authorization or confirmation, I would have received something past the due date for answering the interrogatories.

The Court: You know, Mr. Davis, that the Court would not have entered a default judgment for \$150 million on that basis.

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Mr. Davis: I am confident of that but at the same time I am trying to avoid unnecessary arguments by my friends representing TWA.

But, your Honor, there is something you implied in the way you were putting the matter which is not my understanding of what was the rationale with respect to the requirement by the Special Master. Page 45 of the transcript—

[fol. 2061] The Court: You mean Saturday's transcript?

Mr. Davis: Saturday. Where the interpretation or substantially the same language was used at the time the actual requirement was made, page 45, line 7—look at line 4. When I ask someone for written evidence of something it is for the purpose of making it clear there is no misunderstanding as to the nature or scope of the authority. If we are going to start, and I don't believe that this is really the kind of game—how do you identify anybody as anybody, by footprints, thumbprints?

The Court: In writing, handwriting experts have accepted methods of determining whether the purported signature of Mr. Hughes is in fact that of Mr. Hughes.

My only point to you, Mr. Davis, that is in view of the background that neither the Special Master nor your adversary had much faith in Mr. Hughes personally, and because they also wanted to protect you against what he may do and that certainly is implicit in what the Special Master said on page 45, he asked for written evidence,—nobody has in these proceedings and even in your absence on September 6th has said you are not involved in this personally [fol. 2062] but when that evidence is produced and is attacked as being a forgery, with an affidavit from a person who appears to be reputable and I must admit he hasn't been subject to cross-examination, but his qualifications seem quite clear, aren't you then in a position not to furnish this Court with an acknowledgment by a third person which in fact doesn't comply with the California statute because the California statute says acknowledge that he executed the same.

Those words are not in the acknowledgment, Mr. Davis. Shouldn't you then have prepared, not you, I assume Cali-

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fornia counsel, shouldn't you have prepared for Mr. Hughes' signature an affidavit just as I assume was prepared for the notary public, the form of the acknowledgment? And since you had to bring Mr. Hughes from wherever he was to this notary public, or maybe the notary public was taken to Mr. Hughes, Mr. Hughes merely had to sign a piece of paper, not even tell a story to the notary public and the time involved would be shorter than was involved in telling the story to a notary public who then had to sign an affidavit? Wouldn't we then have had another signature of Mr. Hughes but this time sworn to before a notary public [fol. 2063] which could have been a perfect refutation of what a handwriting expert may have said in a counterveiling affidavit to me?

Mr. Davis: May I suggest what we would then be discussing, Mr. Sonnet would be standing there and making exactly the same argument and now he says all that proves, your Honor, is that the same person who forged the first letter forged the second and we would have to have a trial at that time and bring in all these notary publics and bring Mr. Hughes.

If I were to produce a man walking into the courtroom and say this is Mr. Hughes he would say prove it.

Let me address myself to what seems to me is the only way to solve these questions of forgery and the question of authorization. There is no issue of fact as to how a thing gets signed. Whether or not a writing is in fact an authorized writing—a man may put an X even though he is capable of writing—the law is perfectly clear as I understand it. The only issue as far as I am concerned that ever existed was either this subpoena—and I don't want any side trials, I want to try this TWA case—and to my mind the only thing needed was an acknowledgment that the [fol. 2064] authority that I received was confirmed in writing, the writing was evidence of the nature and scope of the authority so there could be no question as to what it is.

The purpose of any writing is not to chase over the countryside to determine whether a man can forge his own signature.

The Court: There was an alternative route that would have been much more effective from your point of view.

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If you take the trouble of getting an acknowledgment why not get an affidavit?

Mr. Davis: The only problem, I wanted an acknowledgment that the paper which I had here in New York was the one. Let me point out one other thing because I don't think it would be fair to finish without me making this much of an observation. This relates to these efforts to take the deposition of Mr. Hughes next Monday or any time.

TWA has served many notices of deposition for the taking of the deposition of Mr. Hughes. They first took the position he was a managing agent of the Tool Company and the Tool Company could be required to produce him, the notice itself said that.

Then they figured out a better way of annoying and [fol. 2065] harrassing Mr. Hughes and the Tool Company to coerce some kind of settlement without ever disclosing the merits of the lawsuit and they had a big hullabaloo about wanting to locate Mr. Hughes.

Everybody knows there are a lot of people trying to locate Mr. Hughes and a lot of people who would like to coerce some money out of either Mr. Hughes or the Tool Company because of the publicity or notariety that comes when they raise a claim. We know that, we read the newspapers. So then they asked for interrogatories to be answered by the Tool Company, interrupting our discovery proceedings in a technical sense for that purpose and persuaded the Special Master that they needed answers to those interrogatories and publicly disclosing where Mr. Hughes was so they would be able to serve him.

Of course, as a managing agent they didn't need that but no, they need him as a witness. I believe I mentioned that one of the arguments before your Honor we would hear he was a managing agent but that was dropped.

At the time they applied for answers to these interrogatories, your Honor, what did they say to the Special Master? This is not an effort to change the priority for the [fol. 2066] taking of depositions established by this Court. That is the representation that they made.

Now, they want interrogatories answered. In order to induce the Special Master to grant the interrogatories it is

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true first they suggested anyone else could serve Mr. Hughes but finally, no, Mr. Davis will accept service, it will be satisfactory to us if he is authorized.

Now, I got authority to accept service on his behalf—that is not enough. They want to protect me. It has to be confirmed in writing. I obtained that writing, to be sure the writing I would have preferred would not be as broad.

The Court: The problem was couldn't they even slap you with a summons?

Mr. Davis: Then the reason is perfectly apparent for the trip to California. First they said it is revocable, there was an objection. Did they ever before September 6th question it? No, that came as a surprise here. The only thing that I did was when they served me with another notice for the taking of deposition on August 17 and a subpoena out of the California court, I thought that this [fol. 2067] was a game where they were going to take the position how can we arrange to serve Mr. Davis with a subpoena out in a California court because it requires a person to be in California.

I have been trying to make arrangements to accept service in New York, whatever requirements for doing this be but the Cahill firm wouldn't talk to me. All they would say is that this is not a satisfactory authorization. Why, I don't know.

Apparently if you look at this affidavit filed they had this application for the pilot's license since February of last year. Now they are trying to say which is the forgery. My answer, your Honor, is nothing is a forgery if it is done with the authorization of the person. I am saying to you, sir, the law is perfectly clear, there is no basis or justification to even say forgery unless you believe it is not an authorized act.

I believe the law to be if I asked Mr. Cook right here to sign my name to a letter as is sometimes done—

The Court: How about a check?

Mr. Davis: And as to a check it is not a forgery. Now, [fol. 2068] when all this takes place, what do we find? That appears to be now a reason or justification for saying to you we must have Mr. Hughes.

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The Court: I believe I made it clear as to the September 6th hearing these were separate and independent issues and one would have no bearing on the other.

Mr. Davis: I merely refer back to the remarks of Judge Dawson when we have a complaint which does not disclose the facts or allegations. It was filed under seal in order to compel a settlement they are not entitled to. We want to discover the facts and justification for this complaint so our rights can be properly represented.

The Court: Judge Bromley, do you wish to say anything?

Mr. Bromley: With your Honor's permission, my position relates to the additional defendants Metropolitan and Equitable and their respective individuals is that the Special Master was in error in the ruling which he made as your Honor mentioned commencing on page 102.

As I understand him he has in effect said let us put an [fol. 2069] end to these depositions before the direct examination is completed, before there is cross-examination and proceed to what is really a final pretrial.

If one looks at page 103, one will find in paragraph 2 that he contemplates the settling of an order which will define not only the issues as between the plaintiff and defendant but also as between the defendant and the additional defendants prior to the time any depositions are begun, either in defense of or prosecution of the counter-claims.

It seems to me that is a fundamental error for this reason:

The time for that kind of a pretrial has not arrived. What has been done so far as I see it is a preliminary pretrial which was of course proper, which set, charted or assumed to try to chart a course of the discovery and that pretrial order has been in existence and while it hasn't worked out, as your Honor suggested, quite the way it was thought it would, discovery is proceeding.

To interrupt all of that now and come in to try to frame the issues before we, the additional defendants, and before TWA has had any discovery from the central act in both [fol. 2070] controversies, Hughes himself, it seems to be a pure waste of time.

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I think because of the length of time consumed by Mr. Davis and although he wouldn't answer your Honor's question, we all know that he has about 20 more witnesses whose examinations he has heretofore noticed, because of the inordinate length of his efforts to perform his discovery functions, I think the time has come when we should have a go at Mr. Hughes and I think Mr. Sonnett should be accorded a prompt opportunity, perhaps after the finishing of Rommel and Leslie, to get a little discovery from a man who knows most about both controversies and give me a chance to cross-examine Mr. Hughes in so far as Mr. Sonnett's examination necessarily impinges upon the issues posed by the counterclaim.

I suppose we all realize that to a certain degree the issues are inextricably wound.

The Court: That is one of the reasons I assume you had the Special Master, to have somebody present who can possibly draw a line one between the other.

Mr. Bromley: That is right and he is alert and has done that very well so far and can be trusted in the future [fol. 2071] to do it well but I say again I think it would be a pure waste of time—I don't think the situation is ripe for the kind of pretrial discovery the Special Master seems to envisage because you cannot do that until you have substantial discovery on both sides.

It doesn't do any good to look at the pleadings, having in mind nothing has been developed by anybody with respect to the issues involving the additional defendants. You cannot look at the pleadings and have a meaningful limitation of issues until you have had substantial discovery from both sides.

Since Mr. Davis has seen fit to take so much time with the first witness I say the time has come for us to have and for Mr. Sonnett and me to have a go at Mr. Hughes.

The Court: Mr. Kaminer.

Mr. Kaminer: May it please your Honor, I agree with Judge Bromley's observation that it is a little too early for the pretrial hearings which the Special Master envisaged. I would like to call to your attention that we have a practical problem here.

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We want to get the case going. It is costing so much [fol. 2072] money that it is a disgrace and we are not particularly happy I assure you to have been paid as much as we are and to see this kind of thing going on.

Now, in view of what is happening here we are going to have another interesting issue, namely, whether Mr. Hughes considers himself bound. That could be easily avoided. Your Honor has made all the arguments in questions to Mr. Davis which I planned to make so I don't have to make them. If Mr. Hughes appears on the 24th and answers under oath the question of whether or not he signed that paper—

The Court: That is immaterial.

Mr. Kaminer: Sir?

The Court: I think that is immaterial. If he appears and I direct him to appear, which is now the question I have before me, if he answers whether he signed that paper or not is immaterial. You are going down a collateral line which is unnecessary.

Mr. Kaminer: Secondly, I think the only thing which will bring this case somewhere within sensible proportions is if there is now an examination of Mr. Hughes. You have [fol. 2073] heard the reasons for that and I don't want to repeat them but we think this would have a much more beneficial effect on this case than six months of pretrial.

The Court: Mr. Stewart. You represent Dillon Reed.

Mr. Stewart: I won't repeat what Mr. Kaminer said as to the expense in this case. Dillon Reed was brought in some six months ago or seven months ago as an additional defendant on counterclaims and since that time has been forced to spend tens of thousands of dollars in legal fees and out of pocket expenses for documentary reproduction.

It is still unclear why we were joined in the case. We have no power or ability to grant anything that the Tool Company is asking by way of relief. Dillon Reed merely came up with a plan and made a fee but the point is this, your Honor:

After some months of very active litigation we have had no opportunity to make any discovery of facts underlying the counterclaims against Dillon Reed. Our investigation shows the claims against us are baseless.

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The principal charge against us is that we in some way [fol. 2074] concealed the intent of Mr. Thomas to resign from the Tool Company.

How do you prove that you didn't conceal something? We know the charge is false. But the only way we can prove it is through the examination of Howard Hughes. He knows the charge is false and I believe he will so testify. It may be, your Honor, that after the examination of Howard Hughes. He knows the charge is false and I believe he will so testify. It may be, your Honor, that after the examination of Howard Hughes we may be able to dispose of this matter as far as Dillon Reed is concerned either by stipulation or settlement.

There is, of course, the additional question that even if your Honor were to order that appear for his examination, whether that would only be the trigger for a new round of litigation as to whether he is able to appear or whether this would be injurious to his health. However that may be, I think that Dillon Reed—

The Court: Really we have enough problems now, Mr. Stewart, without some of those. Somebody said there is a question that Mr. Hughes is psychotic and some counsel [fol. 2075] in this transcript before the Special Master got off on that point but I think we have enough of our own problems without looking for any more.

Mr. Sonnett: He is crazy like a fox, your Honor.

Mr. Stewart: I will be faced with the problem of a lapse of time that if we get into a year or more of pretrial no witness' memory is going to be that good any more. But I suggest if for any reason he won't appear or cannot appear, that we find out now and not a year from now or two years from now after we have expended thousands and thousands of dollars in litigation fees.

I respectfully urge your Honor that you grant the TWA motion for the examination of Howard Hughes on the 24th.

The Court: Mr. Davis, do you want to say anything?

Mr. Davis: Your Honor, very briefly, because I really anticipated some of the arguments made here today. I didn't understand that we are here to explore in detail the

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desirability of the suggestion made by the Special Master with respect to this pretrial conference he is suggesting. [fol. 2076] I am simply amazed that here we come down to the discovery of TWA and we don't know the basis of the complaint.

Let me read a short paragraph from a statement of Judge Bromley on protracted cases.

The Court: That is not a nice thing to do. I know how Judge Bromley feels. In the motion part counsel argue a decision I handed down last year.

Mr. Davis: I took this out of Judge Bromley's remarks for your Honor:

"It wasn't very long before I got a real shock. Judge Weinfeld sent for all of us and said, 'I am not going to pass on these interrogatories which have been objected to by the Government. There is no need to do that.'"

I will skip:

"Now, I want you gentlemen to tell me your contentions; settle for me the sections of the country which you say competition may be affected and what lines of commerce."

"That was getting down to cases much too fast for me. I had not begun to think about the issues yet but we had to get busy right away; quick we had to make up our minds what the lines of commerce were, what [fol. 2077] the sections of the country were, that was not an easy task. I should have much preferred to postpone that for many years until all the proof was taken but we had to do it immediately for Judge Weinfeld and we did do it. We submitted our contentions that put the case very quickly into a posture where it was commencing to crystalize."

I don't know what happened to change Judge Bromley's views so drastically.

I also refer—I am sure your Honor is familiar with this—but this was a section in the manual of recommended

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procedures for the trial of protracted cases prepared by the United States Judicial Conference in 1958. It reads:

"One of the most effective devices for bringing the issues to the surface is for the Court well ahead of the date scheduled for the conference to direct counsel for both sides alternately to submit tentative written or oral statements elaborating and clarifying the positions taken in the pleadings. These should not be couched in the verbose language of the complaint but should certainly state ultimate facts as to each legal [fol. 2078] issue. These statements may then become the subject of one or more pretrial conferences at which the Court can discuss with counsel for the parties any points that appear to require further clarification or elaboration. Discovery should thereafter proceed in accordance with the bound as indicated to the clarification and elaboration of the issues as result of these pretrial conferences."

That is what I understand Mr. Rankin is in effect or has in effect suggested. He suggested that we go through that process. Ordinarily the plaintiff is going to be required to identify what it is they claim and that justifies this Court to do anything, much less order someone to testify, and let us satisfy ourselves first as to what it is that TWA is concealing.

They started this action, they are the plaintiff. How can the defendant come and answer questions about anything unless he knows what plaintiff is talking about?

That is what Mr. Rankin is trying to do and that is what all of the learned gentlemen are trying to avoid.

The Court: All right.

[fol. 2079] Mr. Sonnett, do you want to conclude?

Mr. Sonnett: I have only one thing to say, your Honor. I think a reading of the complaint which Mr. Davis seems to have lost somewhere in the recesses of his deep, dark, distant past, a reading of the complaint would indicate there is set forth in detail specifically, ultimate facts relating to the nature of the commerce involved and the con-

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spiracy, the acts performed in furtherance of the conspiracy and the effect thereof. There couldn't be any more precise statement of facts.

The Court: I will reserve decision on your motion, Mr. Sonnett, to review the ruling of the Special Master.

(Decision reserved.)

Reporter's Certificate to foregoing transcript (omitted in printing).

**Discovery Proceedings Before Special Master
J. Lee Rankin, October 25, 1962**

[Doc. 226]

[CAPTION]

61 Civ. 2324

[APPEARANCES]

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[53] The Special Master: Anything further, gentlemen? I am ready to rule on this application of the Tool Company to adjourn the deposition of Mr. Hughes and order the return date of the notice for the taking of the deposition and the return date of the subpoena be adjourned.

[54] Before telling you what my final ruling regarding the matter will be, I want to advise you of the various considerations that I have been taking into account in addition to your memoranda, your arguments, and the various papers that have been filed.

In the first place, I do not conceive that Judge Metzner set the date of October 29th as a date that necessarily bound the Special Master as to when the deposition of Howard Hughes should be taken, but it was an indication of the thinking of Judge Metzner, and it was to control, depending upon developments in the interim, at least up to October 22nd.

I also have in mind the statement of Judge Metzner in his order, I think it was in July, in which he modified the order concerning the manner in which depositions should be taken, and said, in words similar, but I am not quoting him exactly, that we must not lose sight of the plaintiff's rights in this litigation.

*Discovery Proceedings Before Special Master
J. Lee Rankin, October 25, 1962*

By reason of my position as Special Master, and my attendance at these proceedings, I have been in a position to determine whether the parties have cooperated, whether they have been diligent in their efforts to discover, in producing documents, and I find that [55] the parties have all cooperated in producing documents in accordance with the Court's order and the orders of the Special Master, that the Tool Company has diligently proceeded with the discovery proceedings in taking these depositions.

There are several matters pending before the Court which have not been decided, and I think it is important to this litigation that we have the benefit of Judge Metzner's decision concerning them.

I also recognize that Judge Metzner is very busy with the day-to-day business of the court that he has to conduct in the trial of cases, that he has several large matters comparable to this one which have been assigned specially to him by the presiding judge of the court, and there is only so much of his time, by necessity, that he can devote to this litigation.

Therefore, it can only be expected that it would take a reasonable time to get a disposition of the matters pending before him and others that may necessarily be presented to him regarding the problems relating to discovery in this action.

I think that we must take this into consideration both as to the Rule 16 application now under submission and ruling of the Special Master concerning the [56] privileged documents claimed by the Tool Company, but which, as I understand it, has not even been submitted to Judge Metzner yet because he has not set a time for presentation of that matter to him, as I understand it.

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The question has been raised by counsel for the Tool Company as to whether or not there is any cause of action here that can be properly pursued on the ground that the Court does not have jurisdiction of the subject matter.

That issue is not one properly before the Special Master. I have no jurisdiction to pass upon that question.

However, I think it is important to the litigation, and the right of any of the parties, to discover, in that there can be no benefit of a final judgment in this action if the Court does not have jurisdiction of the subject matter, and none of the parties can get their claims properly resolved by the Court if there is a true question of that kind in the case.

Therefore, it is, I think, proper that I take into consideration that there is such a claim being made, and that reasonable opportunity be allowed for its presentation at as early a date as possible to the [57] Court.

The claim is made, as I observe from various papers presented, and argument, that the Court does not have jurisdiction of the subject matter because the primary jurisdiction is with the Civil Aeronautics Board, an administrative body.

While I have no authority to pass upon that question, and do not purport to give any opinion about it, it seemed to me that I should examine it sufficiently to see whether or not it could be a serious issue in the case, and I am particularly impressed with the fact that under the holdings of the Supreme Court generally the question of primary jurisdiction is an issue of whether the administrative body has an expertise that should be applied to the controversy before the Courts act, that the question as developed in the

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case of U. S. against RCA, California against the Federal Power Commission, a long line of Interstate Commerce Commission cases, the Shipping Board cases, is whether or not the statute provided for a pervasive regulatory scheme and an exemption from the antitrust laws, and in the cases that I have referred to the Supreme Court has called attention to the fact that the Federal Aviation Act is one of the acts in which [58] such provisions are made.

On the other hand, in the case of Slick Airways against American Airlines, opinion by Judge Forman in 107 Federal Supplement 199, the Court carefully examined the question of whether or not an antitrust suit could be brought and maintained in the Federal Court despite the claim that there was primary jurisdiction with the Civil Aeronautics Board, and he found that the antitrust action could be maintained, principally on the ground that it was not conceived by the Federal Aviation Act that the relief prayed for could be granted by the Civil Aeronautics Board, that the Board had no power to grant damages, treble damages, as requested there, and it had no authority to grant the additional injunctive relief asked for.

Then he dealt with the question of whether or not the particular acts complained of were those which were exempted from the antitrust laws or whether there was something beyond that that was involved in the complaint.

On the rehearing he also dealt with the decision in the Court of Appeals of the District of Columbia taking the other position, opinion by Judge Bazelon, and he distinguished that case and adhered to his opinion.

[59] Then there is a further factor that except in very rare cases the Supreme Court has not said that where they

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find that there is primary jurisdiction in an administrative body that the case should be dismissed, but they have merely held the case in abeyance pending the action of the administrative tribunal or agency, and after that action proceeded with it.

However, whatever the merits of that claim are, it seems to me it is a factor that I should take into consideration with regard to the time for Mr. Hughes' deposition to be taken, and the opportunity for it to be fairly presented to the Court if the Tool Company wishes to press it.

If the argument on jurisdiction goes to the question of motion for summary judgment or motion to dismiss based upon all of the evidence, then it is an entirely different question, and it seems to me it involves the problem referred to by the Court and counsel before, as to whether or not the Tool Company is entitled to get the litigation disposed of without the plaintiff having an opportunity to find out what its counsel now says could be 75 per cent of the facts from one of the witnesses who from the record already developed before us obviously knows some important [60] things about this litigation. The extent of his knowledge, and the range of it, we do not know at this time.

But the question of whether or not a final disposition on motion could be had of the case, assuming the Court had jurisdiction otherwise, without even an opportunity to inquire as to the knowledge of this important witness, is a serious one.

I am not purporting to pass upon either of those questions, but I have examined them sufficiently so that I can say to you that I think it is proper that the Tool Company have an opportunity, within such reasonable time as can

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be made available to it, to raise them before the Court, which is the proper place, in my opinion, that those questions be raised.

Then I think we have the question of how far the Tool Company fairly should be permitted to go before we think of other parties in this litigation, not with the idea of exhausting the rights of the Tool Company for discovery, but with the concept that there could be a pause that does not injure it, and allow the plaintiff to proceed with some discovery before returning to further discovery for the Tool Company.

In addition to all of this, it seemed to me that [61] I must consider and inquire into the problem of logistics.

I do not know how many records these parties will have to move to California to properly examine Mr. Hughes, but in view of what has already happened in this case in the depositions before me, I would think that a considerable number and bulk of documentary evidence would have to be taken by all parties in order to properly conduct any examination of Mr. Hughes. That is one factor of logistics.

Another is the number of lawyers, associates, and the amount of stenographic help that would be involved in such an examination.

Roughly, I guess that there might be some 35 to 40 people, counting those around the table here and those that would have to be working back of the scenes on documents, getting them ready for examination, and the stenographic help.

That may be too large an estimate, or it may be too small. But regardless of how accurate it is, it certainly is a real problem, and it caused me to believe that taking into

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account two holiday periods, one in November and one in December, it was quite unreasonable and certainly undesirable to contemplate [62] that many people going back and forth to California several times to try to adjust to problems and the other considerations involved if we would try to take Mr. Hughes' deposition either on October 29th or during that season.

So I have concluded that the Tool Company should be allowed to complete, within the limits that I will describe, the examination of the TWA witnesses, Mr. Leslie and Mr. Breech, and that I will allow the Tool Company, if it cares to, to make an oral application to suspend the deposition of Mr. Cocke, in light of the fact that his difficulty of recollection up to date has been such that I feel that his deposition has not been very productive, and I should wish to give them an opportunity, if they care to, to use the time to the utmost for productive discovery.

I therefore order that the deposition of Howard R. Hughes be adjourned to February 11, 1963, and that the return date for the notice to take depositions and the subpoena be adjourned to that date, and that the deposition be taken at the same time and place.

I have in mind, in that regard, also the fact that Judge Metzner's order appointing me as Special Master was dated February 7th, and it will be a year [63] at that time during which the Tool Company has had the opportunity to make discovery.

I contemplate also that such period should give it a reasonable time to present whatever motions it cared to to the Court with regard to the jurisdiction of the Court over the subject matter and elements of primary jurisdiction, or

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other legal issues of that character, and I would hope that questions in regard to interrogatories will be resolved, that we will have a ruling on the Rule 16 application, and a determination of the right of all parties to any of the documents claimed to be privileged by the Tool Company which is now on appeal.

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[114] The Special Master: Lady and Gentlemen, I am ready to rule on this matter.

I shall deny the motion to quash the interrogatories served by the defendant Hughes Tool Company on plaintiff dated October 11, 1962, and deny the order to strike the interrogatories.

[115] I will give you my reasoning, for what it may be worth to you.

In the first place, I do not consider that there is any requirement to obtain leave from either the Special Master or the Court for the filing of the interrogatories. The rule does not require it, and I do not construe the order of Judge Metzner appointing the Special Master and providing for these proceedings to require any such permission.

In that regard, however, lest it be misunderstood, I do consider that the rules give the Court or the Special Master ample power to quash interrogatories or strike them or delay the day that they would have to be answered if they were to cause an unreasonable burden on any of the parties because of the fact that they have a responsibility of moving the case along by conducting the deposition proceedings or some other function in connection with the proceedings that are being conducted day by day.

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I invited the application by any of the parties to this litigation to the Court for a proceeding under Rule 16 because I thought it would advance the entire litigation by eliminating issues that the parties did not think were in the case at this time or that they [116] were not satisfied that they could produce evidence to support or for any other reason, and thereby direct our efforts in the taking of depositions to the issues that were important and confine the depositions to such issues as much as possible.

That matter, as Mr. Sonnett has said, is under consideration for determination by Judge Metzner at this time.

I consider each of these rules to be cumulative and independent, and that the whole purpose of the federal civil rules is to aid and assist the acquisition of information which will either support the claim or defense or show that there is nothing to support such claim or defense, and that they should be used by all of the parties, each of the rules, and all of them, as much as possible to get to the facts as promptly as possible so as to reduce the expense of the litigation and the time consumed by the parties, counsel and the court in the handling of the case.

I therefore think that the interrogatories are proper, that TWA could be of great assistance to the progress of the case by answering them promptly, that insofar as any of the answers eliminate or reduce the issues, or demonstrate ultimate facts that will [117] support the claims, they will be of assistance in the conduct of this litigation.

I also think that it is important that the answers to the interrogatories be furnished so that the depositions from now until February 11th can be devoted to concentration on all of the matters that are not furnished by the answers

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to the interrogatories, and also confined to whatever issues can be refined out of the interrogatories and the answers.

It seems to me that it is the responsibility and duty of the Court and the Special Master, as an arm of the Court, to do what can be done to try to determine as explicitly as possible what issues there are in this case between the parties and what ultimate facts there are which will support those issues and what witnesses will be able to testify to them.

Those are the reasons for my ruling.

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[Doc. 184]

[CAPTION]

61 Civ. 2324

Before: HON. CHARLES M. METZNER, District Judge.
New York, October 29, 1962, 10:30 a.m.

[APPEARANCES]

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[3] The Clerk: Trans World Airlines vs. Howard R. Hughes, et al.

The Court: Mr. Sonnett.

Mr. Sonnett: May it please the Court, on study of the transcript before the special master Friday and Saturday it became apparent to me that the problems created by the rulings below were so grave in terms of impact on the progress of this case as to require TWA to try to make its position even more clear than I thought we had before the special master. Accordingly, having spent the weekend in an effort to try to make our position more clear, I put that in a memorandum on appeal to your Honor and was able only to submit it and serve it this morning.

Of course, I have no objection to any amount of time your Honor may see fit to give the defendants to put in any answering memoranda, if they feel one is required.

The gravity of the procedural problem facing us, I think, can best be summed up by saying that if the master's rulings below are permitted to stand in my judgment the TWA case will come to a grinding halt for a period of at least six months.

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I think the master, with the best intentions [4] certainly, but without fully realizing the import of his rulings below, and their effect on this litigation, committed error; and our purpose today is to persuade your Honor that that is so.

The master, below, ruled that the deposition of Hughes should be adjourned to February 11, 1963. He ruled that the Tool Company, if it cared to, might suspend the deposition of TWA by Cocke, and that on the ground if the master felt that the deposition of Cocke had not been productive.

I might pause to say that I do not regard that as any function of the master under your Honor's appointment. Nor do I agree with the master's conclusion because what led him to that conclusion with regard to the deposition in fact may be of great significance, and I believe is, in TWA's case, for reasons which I will be glad to develop later, if your Honor sees fit to have me do so.

The master further ruled that he would allow the Tool Company to complete before the deposition of Hughes commences, the examination of TWA witnesses, Mr. Leslie and Mr. Breech.

Now I have no problem about the completion of the Leslie deposition. It has been ordered; three [5] days have been taken; I informed the master as to when the Leslie deposition was to go on to completion, TWA will have at least three days of cross-examination, and subject to what developed yet in the record to be made by Leslie we might have more.

As to Breech, the injection of Breech, Friday came out of the blue. I frankly wasn't aware that that matter was being argued, nor did I purport to argue it. But I think

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the injection of Breech came because the master had decided initially to postpone the Hughes deposition to February 11th and then he was trying to figure ways and means to fill in the intervening time, and the deposition of Breech seemed to him a useful thing in that regard.

Now as to Breech, I represent him only in his capacity as chairman of the board of TWA. He is not an officer of TWA. He has no executive functions in TWA. He is in this situation at this time, and has been, because he tried to do a public service for this airline by going on its board, as indeed did the other directors who came on, and I might say that they are having a hard enough time doing it, and all they are getting for it is abuse.

However that may be, Breech's status as [6] a party to this case has not been determined. Your Honor, in connection with the motion relating to service of venue has stayed the proceedings as to Breech. The notices and orders heretofore made relate to Breech only as a witness, and under those orders he is to follow later as a witness and not to precede.

As to Mr. Breech, he is out of the country in fact until the middle or late November, I am advised through his counsel. He has stated to his counsel that he would be available in Detroit, where he has his home; thereafter at Phoenix, where he has a winter home, and thereafter he would make himself available to the convenience of the Court and the parties—indeed, he would provide facilities in Detroit at no expense to anyone for the taking of his deposition as a witness when that time came.

Mr. Breech's connection with TWA does not involve any period of time prior to 1961—December of 1960. So it is manifest, I submit, that his deposition would serve no pur-

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pose with respect to the period 1939 through December of 1960. It would be relevant only to 1961 and later.

That period of time, as your Honor will recall, [7] is the period of time covered in our second and third causes of action, and that period of time is the period of time covered in our counterclaim.

You had previously directed that the examinations on the counterclaim be deferred until the end of the discovery program.

So that examination of Breech now could relate only properly to the second and third causes of action, and I see no need that he be examined on those at this time prior to the deposition of Mr. Hughes.

Moreover, that deposition will cause a great deal of controversy as to scope, as to whether it really relates to the answer or whether it relates to the counterclaim.

Further, as to Breech, TWA, in any event, is not in position to produce Mr. Breech since he is neither an officer nor a managing agent of TWA and under Rule 37(d), your Honor, I think it would be improper, therefore, to attempt to require TWA to produce him.

The Court: Whether you can produce him or not his counsel made the offer in court two weeks ago, Mr. Sonnett.

[8] Mr. Sonnett: Yes, sir. I must emphasize this.

The Court: Let's go on to something else now.

Mr. Sonnett: Yes, sir.

The special master below indicated that it would be desirable that certain decisions be made by the Court before Mr. Hughes was deposed. I don't see any relation between the two whatsoever. We are prepared to go forward with Mr. Hughes without the Court's decisions on those matters and abide by the Court's decisions when they come down.

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There is no relationship between the two and there is no impediment, so far as I am concerned, as far as interrupting discovery on the basis of the situation now existent.

The special master indicated that he felt that the taking of depositions be postponed. I submit that that is improper under the established practice. Indeed, what it really consists of, I think, would be an effort to try the case on the evidence now available with the hope of short-circuiting the Hughes deposition which I have said to the master—and, I finally believe, will produce at least seventy-five per cent of the evidence we need to try the case.

[9] I believe with the completion of the Hughes deposition for the first time we can come to your Honor and say, "This now is for real. We believe we will need, so far as TWA is concerned, only the following by way of witnesses," and we will be able to suggest, and suggest in all sincerity, and with some basis to go on, that your Honor set a tentative trial date because the setting of the tentative trial date is the only or one of the only effective ways to expedite a pre-trial, as your Honor knows.

Now on that subject let me pause for a moment. It is not oratory when I say to your Honor that TWA's needs for discovery and an early trial are very real. TWA has a very substantial financial problem. It is the legacy of these defendants. The sooner this case can be tried, the better off everybody is.

At this rate, since we haven't been able to commence depositions for a year, the only effective way for us to proceed is to give us access to what I believe and represent to your Honor will be seventy-five per cent of the evidence before we are ready to suggest a trial date.

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Now the master also made other suggestions [10] relating to the merits of the case and motions that ought to be made, all, I submit, going far beyond the matters entrusted to his responsibility, which, if carried out, would be productive only of further delay.

If the other defendants seek to make other motions, of course they have their right to make them, and, of course, we have a right to be heard, and, of course, the matter will be decided. But it seems to me that the frustration of the discovery proceedings by repeated discussions, as we have had them ad nauseam, of the merits, without tendering motions for decisions, has operated in this case to delay the discovery substantially because the record is full of such discussion, and I submit that that is what has led the very able and conscientious special master into error, because I think that instead of getting on with the job, handling the day-to-day administration of the depositions, he has sought to be concerned about the expense and the delay of the proceedings and to concern himself with short cuts. And I think that that is what has gotten us into the trouble that we are now in.

The master also ruled, and I believe contrary [11] to the rules and the authorities, that the defendants might use Rules 23 and 36 concurrently, that while they are engaged in the depositions and discovery they have a right to put to us interrogatories. The interrogatories, your Honor, I have discussed in detail in my memorandum. I don't intend to take any of the Court's time in oral argument to try to discuss those in detail, but there are certainly conclusions concerning them that I think your Honor will reach just as I have reached.

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These interrogatories purport to be interrogatories relating only to formal allegations in the complaint—paragraphs 2, 3, 4, 7 and 8.

These are allegations identifying the parties, identifying the nature of the trade and commerce involved.

Now, with that tongue-in-cheek approach, I think the master was led into the assumption that all that was involved here was purely formal, were purely formal matters which could readily be supplied, but the fact of the matter is that these interrogatories, as they stand, relate to every single allegation of the complaint—every one of them—and to ask or attempt to ask for them before we have had a discovery [12] would be impossible.

Now as to the statistical ones, which are those relating to paragraphs 7 and 8 of the complaint, I say to your Honor that the fact is—and I am prepared, should your Honor wish to have it, to present evidence today by a witness, subject to cross-examination, that to comply with interrogatories relating to this case proposed by the defendants would require the full-time work of six men or a year at a minimum period.

This is a conservative estimate. It is made by knowledgeable people. One of them is in this courtroom now, Mr. Fellows of TWA, whose responsibilities are such that he knows the details of all this, and I am prepared, should your Honor wish to have this before you, for him to take the stand now.

I am not just making a speech. It will take a minimum of six months to a minimum of a year to do it.

Thus to import into this procedure now the procedure of having to answer interrogatories now before we speak to Hughes is as good as saying we can't have Hughes be-

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fore a year, and I say that that is erroneous, and, for that reason, a burden, and [13] also for the reason that it would frustrate the order your Honor has previously made.

Now that is our position. I am sorry to have had to inflict on you a brief; it is not as long as it looks; there is an appendix to it. It is thirty-seven pages.

And I say to your Honor that it was not until Saturday when I reread the transcript for the third time that I realized and became aware of the full impact and application, and what it could do to this case that I felt that I had to write a brief. And I might say that it was not until three o'clock Saturday morning that I decided to tell you what I sincerely meant and believe to be true.

The Court: Judge Bromley, you are alive and interested. Would you like to talk now?

Mr. Bromley: May it please the Court, I endorse Mr. Sonnett's position and everything that he said.

It seems to me that it has now become apparent that Mr. Davis has been able at every critical point to insert into the consciousness of the special master some new tactic well designed to postpone Mr. Hughes' appearance as long as may be, [14] and the sudden injection of Mr. Breech as the man to be examined before we get to Mr. Hughes is an illustration of that tactic.

There really is no reason to have Mr. Breech examined before Mr. Hughes. As Mr. Sonnett has said, his prime concern is in the area of the counterclaims, not in the complaint.

And, secondly, even the February 11th date on the record is not a firm date because the master made it perfectly clear that he was free to postpone it at the last minute

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again, or prior thereto, should developments, in his mind, warrant it.

Now all Mr. Davis has to do is to extend Mr. Breech's examination and then argue that, after all, the interrogatories are answered and the February date becomes March or April or May, and all the time the company is suffering, and we, Metropolitan and Equitable, as its principal creditors, are likewise suffering.

And the whole controversy really could be measurably advanced should we have the opportunity promptly to examine Mr. Hughes.

I think the master should be reversed in that respect and that your Honor should rule that upon [15] the conclusion of Leslie—because Mr. Cocke, it is apparent, knows nothing about anything—we should proceed to California, holidays or no holidays.

The Court: Mr. Stewart.

Mr. Stewart: Very briefly, your Honor, I would like to speak about the date for Hughes' examination.

We have already submitted an affidavit outlining our position and I don't see any point in repeating what is contained there.

I don't see any reason for your Honor to put over this examination of Mr. Hughes to February 11th. But even more, I endorse what Judge Bromley says in the sense that whatever date is set should be a firm date.

We have all seen how the Tool Company can come up to what is supposedly a firm date and nothing happens. We actually have a logistical problem, your Honor, in going out to Los Angeles to take Mr. Hughes' examination. I would very much hate to see a situation where we plan

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for this, prepare for this, get out to Los Angeles, and on February 11th there is no Mr. Hughes.

So that I would ask, that whatever date is [16] set, your Honor, be a firm one.

The Court: Mr. Weiner.

Mr. Weiner: Your Honor, my name is Stephen Weiner. I appear for the Irving Trust Company today.

We join in the position of counsel whom you have already heard, and it is certainly urged that the date of February 11th should be made a firm date, if indeed your Honor does not set an earlier date for Mr. Hughes' deposition.

We certainly think that the special master, having left it open and then further adjourned it to that date, that it should be closed by your Honor and that Mr. Hughes' deposition should be taken on February 11th, if not before. Thank you.

The Court: Mr. Davis.

Mr. Davis: Your Honor, the position of the Tool Company hasn't changed.

The Court: Has changed?

Mr. Davis: Has not changed.

The Court: I didn't think so. (Laughter)

Mr. Davis: We believe that the Tool Company, as well as the Court, is entitled to know what are the [17] facts which the plaintiff claims it is going to be able to prove and which, if they are able to prove, will establish a violation of the antitrust laws based on the circumstances which are admitted, which we know exist in this case.

And we believe that that is a right which a defendant has, since he has no right to try to force an amendment to the pleadings to disclose those ultimate facts under present practice, and is a right which has been frustrated every

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Before this case was assigned we know that Judge Ryan made an effort to get counsel for TWA to prepare a form of statement of facts or proposed stipulations as to what they claim so that we could see what it is we were denying—understood what they were claiming.

That opportunity was rejected and they said, "No, it was too soon, and the case ought to be deferred; it is a big case. We know what has happened here."

The question now is whether we fix an arbitrary date, whether it be February 11th or some other date and say, "This is the date on which the Tool Company has to be prepared in order to answer [18] questions to be interposed."

The question that we have today really is that the plaintiff is unwilling to answer interrogatories. This plaintiff has been unwilling to disclose what are the facts which underlie the complaint ever since the complaint was filed in the proceeding.

Now we started out by the taking of oral depositions in the belief that normally that is the most expeditious way of finding out from the plaintiff not only what it is that he is claiming but also, at the same time, discovering what the evidence is which supports the claim, because there is no question in my mind that the discovery rules perform two functions:

One is to give some means to the parties to develop and narrow and identify the issues, and the other is to discover evidence to support whatever positions the parties want to try to prove, come the trial.

Now the special master has found that we have proceeded diligently in our efforts to conduct oral depositions. I don't think anybody can question that.

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[19] I took the trouble to do some statistical analysis of what has transpired because I knew that the time would come when I would hear from Mr. Sonnett, seven months having elapsed, or a year having elapsed, and the fact of the matter is that we have had a total of fifty-five days of depositions—Mr. Tillinghast, Mr. Leslie, Mr. Rummel, Mr. Cocks—to date.

Had we had those fifty-five days continuously from the time that we started we would have been up to April 13th. This is the end of October.

More than that, there is reference to 9760 pages of transcript. Only sixty per cent, however, of that is Qs and As. The balance has been left to objections, sometimes on pretexts to objections to form, and then we have had argument.

Now if I were to take the sixty per cent of the pages of transcript, and assuming that all my opponents had done with their objections, their objections to form and let a ruling be made, I would have had, and I would have covered, the same ground that I have covered by sometime in March of this year instead of now, this being the end of October.

The balance of the time has been spent by bringing me here before your Honor on one pretext or [20] another, all aimed at the charge that we are delaying or avoiding or doing something with respect to the deposition of Mr. Hughes.

Now the fact of the matter is that this Court has consistently held that the defendant was entitled to discovery. Your Honor has set forth the schedule and we have attempted to follow that schedule, and we were entitled to complete the deposition only if TWA brought some of the other witnesses before they were to commence their discovery proceeding.

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More than that, your Honor, eight of them, by giving them all the documents in our possession that they have asked for—the only thing that is still pending is some question with respect to privileged documents and communications between counsel and his client.

And now we hear, in fact we know, that eminent counsel for TWA investigated this matter before commencing this action and now they tell us that it is going to take them six months to describe or identify the trade or commerce which presumably we have interfered with.

I don't understand why.

[21] Now it is true that interrogatories—and one of the disadvantages of proceeding by interrogatories, is that I must cover whatever imagination my adversaries may have in answering in whatever they may be talking about. They appear to be lengthy. There is no question but that they cover the same ground from different angles. Now all it requires them to do, however, is to state what they claim; and they don't even have to state that. If they don't have any facts all they have to do is to state what knowledge or belief they have with respect to the facts: none of their contentions.

There is no question, your Honor, that interrogatories are one of the tools available to compel an adversary to identify the issues. That is clear. You can find many decided cases.

Now, to be sure, there are other ways of approaching this question of forcing the plaintiff to identify what it is that he claims.

One time I hear Mr. Sonnett say that whatever they are talking about has nothing to do with the approval from the CAB. At the same time I find in the complaint that it

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is claimed that we acquired seventy-eight per cent of the stock for the purpose [22] and intent of controlling TWA and using that control in some way so as to interfere with the manufacture and financing of aircraft, the fact not being clear as to the aircraft being used by all carriers or merely aircraft to be used by TWA.

But we did not know at the time we denied that the acquisition of the stock was approved by the CAB.

There is no question, I suppose, that to a large extent the seventy-eight per cent stockholder did exercise some control over the management of the corporation which became in effect, its subsidiary.

CAB approval in the 1950 control case clearly recognized what the effect would be of approving that, and so certainly we have, if that is what they are referring to, interfered with it.

I don't think enough, but that is beside the point. It has nothing to do with the anti-trust laws, is my point. And whether or not it was seeking to acquire this type of aircraft or some other type of aircraft was made by the board of directors that was subservient to the wishes of the Tool Company or was made by the Tool Company, in effect, or by Mr. Hughes while he was chief executive officer, [23] president of the Tool Company.

What difference does it make? If it involved liability, it involved liability to the minority stockholders if we did not do it properly. As a matter of fact, we operated TWA with success, which is more than they did in the last couple of years since they took over control.

I don't understand what the problem of TWA—what its financial problems are, which, to be sure, we were aiding by the use of our credit, which is now no longer available

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to them, but what has that to do with the necessity of examining Mr. Hughes? Unless we are trying—and we should all be frank enough to recognize what Judge Dawson had to say—and we know that that is used quite frequently, and if that is what they are trying to do, I think they ought to come out quite frankly and say so.

In any event, whatever their purpose may be, my position, your Honor, is simply this: I am prepared to follow any procedure suggested by your Honor or the special master, or by anyone, including Mr. Sonnett.

How do you want me to go about finding out what it is that TWA claims has taken place which justifies [24] the assertion that the anti-trust laws have been violated by Mr. Hughes or the Tool Company or Mr. Holliday?

And once that is done I will be willing, without resisting, to follow any schedule for the purpose of discovery of whatever evidence there is in anybody's possession to support those contentions or those facts.

That is why I know just exactly what we have. We don't have, it is true at this time, any way for Mr. Sonnett's anticipating the disposal of this litigation. And he says that I have encouraged that. But whether I am right or wrong about it, what is it that I am expected to do in order to carry out what is clearly the intent of the rules, that plaintiff—particularly the anti-trust rules in the so-called "big case"—is going to be entitled to file a complaint which does not have to disclose what I call a cause of action, as this one does not. Oh, it states a claim. It claims that we violated the anti-trust laws. How I don't know.

Why is it that the CAB approval does not cover the situation? I don't know. I have prepared and submitted an exhibit, Defendants' Exhibit 163, [25] before these wit-

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nesses wherein I have listed every acquisition of aircraft by TWA from 1939 to date. They don't know where they came from on a few. Most of them were acquired directly from the manufacturer. In some instances witnesses testified, and they will testify some more when I continue with Mr. Leslie, the financial officer, because TWA did not have the credit available that the Tool shop had to place an order to help to finance. Usually it requires the consent of one of the additional defendants, the Equitable.

Mr. Sonnett says that is not what I am talking about. Well, I thought that perhaps we were forcing, because there was some reference to a captive market here. I inquired from Mr. Cocke and the others that testified, and Mr. Rummel testified that they always want more and it is just a question of their getting as much as they could, and they were trying to persuade Mr. Hughes that they need more aircraft and finance, so would he please help to finance it.

So we weren't shoving the equipment down their throat. And we weren't really in restraint of trade. Restraint of what trade? The trade of [26] manufacturing and selling aircraft?

Mr. Rummel testified that Mr. Hughes—that is, Mr. Rummel at the suggestion of Mr. Hughes—contacted a list of people who manufactured aircraft during that period in trying to develop an aircraft best suited to TWA's needs. But how soon those decisions were made, I don't see how they interfered with that aspect of the business.

They alleged one time that the Tool Company had plans for itself getting into the manufacture of aircraft, which were never carried out. There is a suggestion in the testimony that that was done for the purpose of seeing if they

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could not get a better deal from those who were not engaged in the business. Suppose that we had gone on with those plans. How would that have restrained the trade of manufacturing aircraft? There would have been one more manufacturer in the field.

Now we are talking about the financing of the manufacture of aircraft. They say that we voted our stock or exercised our control over this subsidiary in a manner which prevented TWA from financing themselves the way they wanted to, I assume. I don't know by what right these lending institutions [27] claim that they had to lend them money if it wasn't necessary.

But however that may be, I suppose that the controlling stockholder had the right to have some views as to what was the best way of financing the business of which he is a stockholder without having anything to do with the anti-trust laws.

I don't know what theory they are going to come up with.

I proceeded expeditiously with depositions. Admittedly I am still finding out what the nature of their claim is. I am finding out that which negates the existence of the violation of the anti-trust laws.

We suggested the possibility of a pre-trial conference for the development of the issues. They resisted that approach also on the ground that it was likewise premature, and they did not want the matter to be referred to a special master.

So we proceeded with Rule 33 and now we are told that that is not a right way to proceed in spite of the fact that the cases I read make it clear that it is exactly the way to proceed. And the cases also have held that it is a proper way to [28] proceed even if my interrogatories are addressed to matters that are presumably within my knowl-

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edge and not within theirs, because I am entitled to admissions from them in answer to my interrogatories. And I am also entitled to discover, if it is true, that they don't have a cause of action.

I have reference, your Honor, to the decision by Judge Conger in the Interboro News case, which also involved an anti-trust action, where he pointed out that the amended complaint follows through containing little more than a short plain statement of the claim even though it had some thirty-odd allegations—thirty-seven paragraphs.

And then he says that still the rules do contemplate "that such a pleading, which is little more than a notice of claim, should be supplemented by some procedure designed to give an opponent additional information necessary to prepare for trial."

And I skip some and continue:

"The plaintiffs suggest that the defendants have acquired this knowledge through prolonged depositions. If the responses of counsel contained in the excerpts annexed to the memoranda [29] are fair examples of what the defendant has learned they know little more than they did after reading the amended complaint."

Now in our case, after taking these oral depositions, all we learned is that they stimulated competition.

Therefore he concludes that these interrogatories come within the power of the discovery rules, which are "to narrow and clarify the basic issues between the parties," referring to the *Hickman v. Taylor* case.

They do not call for plaintiff's evidence; they call for that which the plaintiff's evidence purports to prove.

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Now I am also very conscious of the decision of Judge Kirkpatrick in Pennsylvania shortly after the new rules in 1938 that came into effect. That is referred to also in my memorandum before the special master.

By the way, your Honor, it is my clear understanding that we were to appear today based upon the papers before the special master and I confirmed that late Friday. I understand from Mr. Sonnett today that on Saturday he wanted to submit [30] some additional material and this morning, just before coming to court, I did receive something which looked to me to be voluminous—I don't know whether it contains an appendix or not—I have not had a chance to look at it. I don't know what it contains. And if it is to be considered by your Honor I would like to have an opportunity at least to decide whether or not it requires any answering paper on my part.

The Court: I will give you a week. Next week, Monday.

Mr. Davis: I would like, your Honor, if I may, to advise your Honor whether or not we need it at all because quite frankly whatever schedule will be established with respect to the deposition of Mr. Hughes I am terribly anxious that I do get answers to my interrogatories at the earliest possible moment. And for that reason I am inclined, unless I find something in this memorandum which I feel requires clarification, I would be inclined to let the matter rest for your Honor's decision based upon what seems to me is well established law in this district, that interrogatories are a proper means for delineating the issues.

So far as the service of interrogatories— [31] while oral depositions are going on—I have only found one decision which seems to me is in point. That was the decision

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by Judge Weinfeld, which I referred to in my memorandum, in which he says that the deposition discovery rules create integrated procedural devices, again referring to *Hickman v. Taylor*.

And then he says, "The sections are complementary to one another and the use of one does not restrict the further use of the other on the same subject matter."

Then he ends with this sentence:

"The various sections may be used independently, simultaneously or consecutively as required."

And he cites for that *Hawaiian Airlines v. Trans-Pacific Airlines*. This case is referred to in my memorandum before the special master, and it seems to me that the very thing that counsel for TWA were urging not so long ago about simultaneous and recurring depositions, or suspending one deposition and taking on another, all attest to the fact that we have been accustomed to using all these devices however the circumstances may develop, subject always, [32] of course, to the appropriate application to the Court for relief under 30(b).

And if it should be claimed—I don't understand why it should be claimed—but if it should be claimed that my taking the deposition of Mr. Leslie, now working for Douglas Aircraft, imposes a burden upon them with respect to answering the interrogatories, I would be willing to consider giving them a little time to answer.

But I don't know why it is so difficult for them to state what it is that they claim.

The Court: Mr. Sonnett has said that it would take him six months to gather the statistical data that you have

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asked for. I am not familiar with the statistical data you have asked for.

Mr. Davis: Well, your Honor, the interrogatories do not ask for any statistical data other than to ask them what it is that they talked about in their complaint.

The thing that is not clear in their complaint is whether they—whether the market is that of TWA or other than TWA, and they cite in their complaint a bunch of statistics with respect to matters that we concede. And all I have asked them to do is to [33] identify what they are talking about. I would be perfectly willing right now to say, "Well, give me what you can. Give me what you can and we will hold in abeyance what you can't give me."

I am finished with the interrogatories. This doesn't cover the entire complaint. I made it clear to the special master that I was supposed to proceed seriatim. We won't submit to them more than one set of interrogatories.

All I am asking you to do at this juncture, as far as I have gone in my attempt, is to identify what business they claim the Tool Company is in—that is crucial, of course, in any question involving the anti-trust laws—and to identify the line of commerce which they claim that we have attempted to monopolize or attempted to interfere with or to restrain.

And if you look at the interrogatories you will see that it follows exactly the allegations of the complaint.

It says, with respect to allegation so and so, identify what you are talking about in here. If they didn't have it before they filed the complaint, let me have what they do have. And then they can [34] supplement later, when they get more information, or indicate where the statistics that they cite come from. That is one of my questions.

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One thing which is bothering me a little bit in these interrogatories, your Honor, is periodically I asked them to identify who are the persons who participated in the answers and what is the basis of the knowledge or information that is used to answer the questions. That is difficult for them to do because they don't have it.

But that is the only part in the interrogatories that I am aware of where they might have a little difficulty.

Now it is true that in going through these interrogatories I in effect have forced them to come out and identify what is the course of conduct that they claim the Tool Company has engaged in which supports the filing of this complaint.

Judge Kirkpatrick pointed out that the burden which is on a defendant who is sued, assuming that he is sued without cause or justification in the sense of without facts to support it, is pretty tremendous, and he is entitled to protection against that impose a burden. And that is particularly [35] true when being charged with violations of the anti-trust laws.

Of course, it is a burden upon the plaintiff. And I would like particularly to call to your Honor's attention to two portions in this decision, which is also referred to in my memorandum. Judge Kirkpatrick says:

"Courts have always been keenly alive to the burdens by way of expense, loss of time, and exposure of private business affairs which discovery imposes upon anyone required to submit to it, burdens which have increased a hundredfold with the volume and complexity of modern business, and have fully appreciated the great wrong of subjecting an innocent defendant to

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them merely to let a plaintiff who may think that he has been wronged learn that he has not."

On the other hand he points out that a plaintiff is entitled to plead a cause of action when he has one.

Then he says, with respect to the procedure to be followed—after referring to a decision by Mr. Justice Cardozo he says, "Searching for guidance in the reported decisions under the old practice and [36] avoiding restrictive formulas, the only general rule having 'the capacity of flexible adjustment to changing groups of facts'"—the standard which Judge Cardozo laid down—"which I can discover is that the plaintiff before he is granted sweeping discovery must somehow convince the court that there is at least reasonable ground to believe that a cause of action exists and can be proved if the necessary facilities are afforded him."

That is exactly my position, your Honor. Give them all the rights they want—Mr. Hughes or anybody else—and impose this great burden upon us and upon him, but only after, in one way or another, they have come forth with enough to make this Court feel that there is a reasonable ground to believe that there is a cause of action under the anti-trust laws against Mr. Hughes, and he should be required to subject himself to this burden that they are trying to place upon him. And let's not be naive and overlook the statement of Judge Dawson.

The Court: All right, I will give you until November 7th to submit an answering brief if you care to. If you decide you don't want to submit an answering brief, call my chambers and let me know.

Toolco's Notice of Motion, December 4, 1962

[27289]

[CAPTION]

BEFORE THE SPECIAL MASTER

SIRS:

PLEASE TAKE NOTICE that upon all the proceedings heretofore had herein and upon the annexed affidavit of Chester C. Davis, Esq., defendant Hughes Tool Company ("Toolco") will move the Special Master on December 6, 1962 at 10 A. M., or at such other time as may be fixed by the Special Master, at Room 3111, 120 Broadway, New York, N. Y., for a direction that following the completion of the present examination of E. O. Cocke, and absent changed circumstances, Toolco may either upon the completion of the deposition of [27290] A. V. Leslie or in conjunction with his staggered deposition, next depose Ben-Fleming Sessel and the Irving Trust Company by Sessel and Arthur L. Wadsworth and Dillon, Read & Co. Inc. by Wadsworth.

Dated: New York, N. Y.,
December 4, 1962.

- Yours, etc.,

CHESTER C. DAVIS, Esq.
Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.

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[Doc. 237]

[CAPTION]

61 Civ. 2324

[APPEARANCES]

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The Special Master: Mr. Tenney, I will hear from you first in regard to how this stipulation is any different than the subpoenas that have been served in this case.

If you recall, in this record there were some subpoenas to produce documents served earlier, and they departed from the original subpoenas that Judge Metzner had ordered documents to be produced under? [4] Do you recall that? Maybe you don't in the record.

Mr. Tenney: I am not quite clear of what the difference is that you are referring to.

The Special Master: That was the case, and I raised the point—I think the Cravath firm had theirs somewhat different, and they proceeded at once to modify them so that they conformed to the subpoenas, and the lists of documents particularly, that Judge Metzner had ordered to be produced, both as to the Tool Company and to the other parties.

Insofar as their departure, I would like to know it if there is any in this case. I understood from Mr. Ordovery that there was some difference between this and the listing under the subpoena for the other documents, earlier.

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Mr. Tenney: Mr. Rankin, there is certainly a difference, and I might as well start off by saying that the schedule of documents to be produced which is annexed to this stipulation is the product of an agreement between counsel for TWA and counsel for Atlas as to the documents that counsel for Atlas are prepared to produce, and reflect a joint effort to avoid undue harassment or oppression on Atlas, while securing for TWA those documents that TWA considers [5] important at this time in connection with its preparation of this case.

There was no effort made to have the schedule read exactly as any previous documentary schedule has read. I am sure there are many differences. I am not quite able to comment on any particular one because the differences are quite extensive. This is a very narrow subpoena.

The Special Master: You recognize under the rule that you are entitled to this if you show good cause, don't you? That is what the rule says. That is the reason I want to get this question clarified at the start. Do you want to see the rule?

Mr. Tenney: I am sorry, Mr. Special Master, but I am not quite clear of what you are referring to as to the requirement of making an affirmative showing of good cause. I do not think we would have any difficulty in doing so, but I would like to be enlightened.

The Special Master: Don't you consider that Rule 34 requires an affirmative showing of good cause to discover documents?

Mr. Tenney: Mr. Special Master, I did not consider that we were proceeding under Rule 34. We are [6] proceeding under Rule 45.

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The Special Master: I will hear you. I am not sure whether you are entitled to proceed under Rule 45, in light of the fact that you know you can't depose any witnesses at this time in light of the Court's order. I have, so that you will understand, construed that it was the law of the case so long as you conformed to the prior requests for documents, that the various parties were entitled to them, even though they didn't have the right to examine the particular witnesses.

That is one reason why I wanted to know why there was a departure, and what the departure was.

Mr. Tenney: First of all, Mr. Special Master, I did not understand that the plaintiff was under any obligation to move for permission to obtain the issuance of a subpoena duces tecum, and to serve it. We did not so move. I believe that other parties have followed the same procedure without having moved for permission.

I do not believe that there is any requirement to move.

My understanding of the rules is that under Rule 45 any party is entitled to the issuance of a [7] subpoena by the Clerk upon a showing of a notice of deposition.

My understanding is that there is no requirement of showing good cause, and my understanding further is that no party has any standing to object to the production of documents.

I recognize that there is an order applicable here which for reasons that are very obscure to me, has prevented the plaintiff to this time from taking any pre-trial examinations.

I have understood that because of that existing order, which, as I say, I have difficulty in understanding, and I

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consider to be entirely unjustified under the rules, we are under a direction not to take the deposition of any person on oral examination, but I have also understood that we were permitted to avail ourselves of the rights that are ordinarily available to parties under the Federal Rules, to engage in pre-trial discovery, to prepare the case which we instituted in this court as long as we did so without interfering with the conduct by Mr. Davis of the pre-trial examinations which he is conducting at the present time.

We have taken extreme precautions to avoid that.

[8] We have stated on the record, and I repeat on the record that we do not intend to take an examination of any person pursuant to the notice and the subpoena which we have served. We have so stated to counsel for Atlas.

In other words, we have confined, and I believe that this is the most that we can possibly be expected to do under the existing orders—we have confined this very limited effort to do something in support of our case, to a request for clearly relevant documents from a person, a corporation, very closely involved in some of the central actions in this case.

We have phrased our subpoena and our schedule so that the documents called for are without exception within the schedules that we were permitted to obtain from a party.

The schedule is far more limited, however, because we have been careful to avoid any unnecessary harassment of a person not a party to this litigation.

We believe we have been successful in doing so, because we have been able to agree with counsel for that third party on a formula which they do not consider oppressive.

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I am not aware of any requirement for me or for [9] TWA to obtain permission to proceed this way, and if there is a requirement, I should like to be enlightened on it.

The Special Master: I am sure that you are aware that all the other proceedings as far as the documentary production, were pursuant to Rule 34, as I recall.

Mr. Tenney: I do not believe that to be the case, sir. I believe most of them have been pursuant to subpoenas duces tecum.

The Special Master: Do you have a question about that, Mr. Bradner?

Mr. Bradner: Mr. Davis obtained all his documents under Rule 45.

The Special Master: That is correct, but not as to the other parties not taking depositions.

Mr. Bradner: As I understood the prior cases of Merrill Lynch and First Boston, were pursuant to the same procedure which is involved here.

The Special Master: That is right.

Mr. Bradner: I assumed this was being done under Rule 45 and not Rule 34.

Mr. Tenney: Mr. Leslie is another example. Both plaintiff and defendant secured documents from [10] Mr. Leslie on a subpoena duces tecum.

The Special Master: But he was being deposed in accordance with the Court's order. That is the distinction I was trying to point out, Mr. Tenney.

Are there any exceptions in that regard?

Mr. Tenney: Merrill Lynch, First Boston, Dillon, Read, at the instance of Mr. Davis. As a matter of fact, I believe all of those who are now presently additional defend-

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ants were at some prior time third parties while this order was in effect, and Mr. Davis secured documents from them in exactly the same procedure—along the same lines that we are now proceeding.

The Special Master: What I construe may be wrong. All the people that you have listed so far as being on the list that the Court ordered their depositions be taken, with a priority to the Tool Company. I think that is different.

You may have some reason why it isn't, and if you will tell me I would appreciate it. The depositions would be Merrill Lynch and First Boston.

As I understand, that matter is before the Court.

Mr. Tenney: Merrill Lynch and First Boston are before the Court, sir?

[11] The Special Master: Yes, I understood that there were some objections. Is that resolved?

Mr. Tenney: There are none to my knowledge, the documents have been produced.

Mr. Davis: We had an argument before you, and I did not ask for a review of your ruling.

The Special Master: I understood that First Boston and Merrill Lynch directly took something to the Court.

Mr. Davis: They were contemplating something.

The Special Master: That is the last communication I received on it.

Mr. Davis: I don't know whether they have or not. But I do know that documents have been produced pursuant to some arrangements, as to which we did not object, following the ruling of the Special Master on an argument that was had at the offices of the Cahill firm when those two subpoenas were at issue.

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I would like to reserve my comments for when it is my turn to do so.

[12] Mr. Tenney: I wish again to make it very clear that I consider that I was attending this argument as an argument of a motion that had been made by counsel for Toolco with respect to our subpoena, and that in the absence of any such motion, the subpoena is beyond any question whatsoever a fully valid and enforceable subpoena, and I do not understand why I should be required to speak first on this, but I now shall, if that is your wish, sir.

The Special Master: The reason I thought you should speak first was because of an obligation to show cause.

Mr. Tenney: I do not believe there is any such obligation, sir, but I shall try to show cause.

The Special Master: I do not recognize under the Court's order that you have any right to produce any witnesses at this point in the taking of the depositions, because I consider that I am bound by the Court's order giving the Tool Company priority except insofar as it is modified by my order that is on review, concerning Mr. Hughes.

Mr. Bradner: Mr. Rankin, if I might be heard on this, it is my recollection of what transpired before—shortly after you ruled that Mr. Hughes was [13] to be examined on February 11th, Mr. Sonnett raised the question before you as to whether TWA and other parties who were so advised might proceed by the method of obtaining documents, dry depositions, so-called, under Rule 45.

I understood you to rule at that time that this might be done to the extent that it did not unfairly interfere with the examination of the Tool Company, which it was conducting.

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I understood that the subsequent subpoenas that were issued in connection with Merrill Lynch and First Boston were issued under that prior ruling of yours.

I certainly came away from that hearing with the very definite understanding that I had been listening to an argument under Rule 45, in which Mr. Davis was objecting to the subpoenas, and the whole argument was based on that basis.

I must say that this comes as quite a surprise to me to have the position taken that these subpoenas are under Rule 34.

As I remember, under Rule 34 you could not bring such a subpoena.

The Special Master: I do not recall that particular place in the record. Could you refresh me?

Mr. Bradner: I did not come prepared with the reference. I did not anticipate the problem.

The Special Master: As I recall, it was an inquiry as to the production of other documents during

Mr. Bradner: It was in connection with the production from third parties. I think that all of the parties to the case have produced to all of the other parties of the case under Rule 34, or under prior Rule 45 subpoenas.

The Special Master: In connection with their depositions.

Mr. Tenney: This case was instituted on June 30, 1961, under the provisions of the Sherman and Clayton Acts. Service was obtained of two of the defendants—one immediately and one in February, or January, I believe.

There has been no successful attack on the service, on the jurisdiction of the Court.

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A motion was filed by counsel for Tool Company about fifteen months ago, which was in form a motion to dismiss the complaint.

That motion has never been brought on for [15] argument. Judge Metzner has expressly stated on several occasions to Mr. Davis that while he may bring that motion on for argument at any time that he wishes Judge Metzner does not believe that it is well-founded at this time.

Now, sir, notices to take depositions of various witnesses, both party and non-party, were filed by counsel for Tool Company and by counsel for the plaintiff.

There was a good deal of argument as to what the schedule of those depositions should be. The order of Judge Metzner to which the Special Master has referred sets forth a schedule for the taking of the existing depositions as to which notices had then been filed.

There is not a word in that order granting to Tool Company priority. There has never been a word in any court order entered in this case granting to Tool Company priority of taking depositions as such, contrary to what counsel for Tool Company has said, and I believe contrary to the understanding that the Special Master a few minutes ago expressed.

The Special Master: Will you explain that to me, Mr. Tenney?

[16] Mr. Tenney: In the first place, sir, that order dealt, and on its face it purports only to deal with the specific notices of taking depositions that were before the Court.

Counsel for Tool Company requested an order, and has acted ever since as if he obtained an order granting him priority of discovery. No such order was entered.

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There was an order entered which specified with respect to the particular witnesses whose depositions had been noticed, an order in which they would be taken, and in point of fact all of the depositions which had been noticed by counsel for Tool Company are listed on that schedule prior to the depositions which had been noticed by counsel for TWA.

The Special Master: Why doesn't that mean priority? I am not following you, I guess.

Mr. Tenney: In the first place, sir, the notices of taking depositions filed by counsel for TWA, and I am sure that counsel for Tool Company would take the same position, by no means exhaust the list of witnesses which counsel for TWA proposed to examine before trial of this action.

I feel sure that counsel for Tool Company feels [17] much the same as to his list so far.

The order entered by Judge Metzner was limited to the depositions before him. His failure to enter an order granting general priority of discovery to counsel for the Tool Company constituted, it seems to me clear, a rejection of the suggestion that Mr. Davis has so often made, that there is some right in the defendant to examine as long as he wishes before the plaintiff can commence.

Now, sir, Rule 26 of the Federal Rules reads, in part, as follows:

"Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery, or for use as evidence in the action, or for both purposes. After commencement of the action, deposition may be taken without leave of Court, except

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that leave granted with or without notice must be obtained if notice of the taking is served by the plaintiff within twenty days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45."

From the commencement of practice under the Federal [18] Rules until 1962, there was a general practice in the Southern District which has been characterized by many people in different ways, but a practice of giving the defendant the first opportunity to take examinations.

In the original form of Rule 26, there was not the language about leave of Court being necessary for twenty days after a complaint was filed, when the notice was served by the plaintiff.

That amendment to the Federal Rules constituted a limited recognition by the revisors of a certain soundness, a limited soundness in the point of view then being taken by the Southern District.

As a practical matter in those twenty-four years—twenty-two years, I guess it is actually—almost no other district in the country followed any general priority rule.

Moreover, I think that I can say with considerable confidence that in the Southern District there was never any application of this general rule which permitted the defendant to take examinations exclusive of any right on the plaintiff to take examinations for an extended period of time, such as the period of time that these pre-trial depositions have [19] continued.

Without exception, when that problem actually arose, a practical solution was found by the judges of the Southern District Court.

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One of the common solutions was alternating depositions. Another solution adopted in the Ford-Ferguson case during the latter part of its pre-trial discovery procedure, which lasted for several years, was concurrent depositions, arranged in such a way so as to minimize as far as possible the burden on counsel of having concurrent depositions, but more importantly, both as to the concurrent deposition procedure and the alternating deposition procedure, most importantly, I should say, so arranged as to recognize that the function of a court is to hear the complaints of the injured, and to act upon them, and that the rules are directed to be construed by Rule 1, and I quote:

"These rules govern the procedure in the United States District courts in all suits of a civil nature, whether as cases at law or equity, with the exception stated in Rule 81. They shall be construed to secure the just, speedy and inexpensive determination of every action."

[20] The plaintiff has come to the United States District Court for the Southern District of New York—Section 4 of the Clayton Act, substantially similar to Section 7 of the Sherman Act, which reads:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States, in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

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I repeat, "may sue therefor in any district court of the United States."

[21] The federal rules are stated to govern the procedure in the U. S. District Court in all suits of a civil nature, and that they are to be construed to secure the just, speedy and inexpensive determination of the action.

There is not a word in the federal rules about priority to a defendant.

On July 1, 1962, the Judges of the U. S. District Court for the Southern and Eastern Districts of New York put into effect new civil rules. Rule 4 reads in part:

"From and after the 40th day after commencement of an action, unless otherwise ordered by the Court for good cause shown, neither the service of a notice to take the deposition upon oral examination of party or witness, nor the pendency of any such deposition shall prevent another party, adverse or otherwise, from noticing or taking the deposition upon oral examination of party or witness, concurrently"—I emphasize that word "concurrently"—"with the taking of deposition noticed or commenced earlier."

It has been ruled by Judge Metzner in this matter that that rule now in effect in this district does not deprive the Judges, Judge Metzner in this [22] case, of the discretion to apply a different procedure in the sound discretion of the Court.

Judge Metzner early in July, in the exercise of that sound discretion continued temporarily the order that was then in effect, permitting counsel for Tool Company to take examinations according to the schedule previously entered,

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and forbidding, in effect, counsel for the plaintiff from taking depositions in accordance with the schedule previously submitted.

It is our position, and we have expressed it unsuccessfully, I am sorry to say, in these proceedings here, and we now have the point on appeal before Judge Metzner, that all possibility of exercise of discretion contrary to the express—to the sound exercise of discretion, I should say, contrary to the express provisions of the Clayton Act, or the Federal Rules of Civil Procedure, and the Civil Rules for the U. S. District Court for the Southern and Eastern Districts of New York, has now expired, and there is no conceivable justification for further delay, in commencement by plaintiff of the oral examination before trial of key witnesses, particularly Mr. Howard Hughes.

Now, sir, I realize that this is something [23] which is not directly before you this afternoon. However, it is only possible to consider the decision with respect to what is before you this afternoon in the light of this record.

Under the rule that has been adopted here, and the Special Master has been applying, the plaintiff has been prevented from engaging in oral discovery, if I can use a loose term, that is, of putting a witness on the stand under oath, and asking him questions. That right has been to date granted solely to the defendant.

However, within extremely narrow limits, I am sorry to say, in this case now 18 months old, brought by a public service corporation, publicly owned—Mr. Davis may know more about the number of stockholders than I do, at the moment, because as I say, I was not prepared at this point—but with thousands of stockholders, against a ma-

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jority stockholder and its controlling person, which is alleged in our complaint to have grievously injured this public service corporation.

As I say, in these 18 months the plaintiff has been granted certain extremely narrow rights, always subject for some reason that I again do not [24] understand to the injunction that they must never be exercised in any such way as to interfere or be burdensome upon the defendant.

Those narrow rights have related to documentary discovery. Judge Metzner ordered the production of documents by parties, quite separate from the schedule of taking oral examination before trial.

While sitting through this year of depositions, counsel for plaintiff has endeavored to make such use as it can of this limited right, this limited opportunity I should say, to exercise the rights given to it by statute.

It has tried to do so, as enjoined upon it, so as not to be unduly burdensome to the defendant.

I find it interesting that we do not seem to have difficulty with the third parties to whom we have addressed these subpoenas. There have been several. We have explained to them that we are willing to be reasonable about these things. We are not trying to harass them or be burdensome. We have a large lawsuit here. We have a duty to our client. And if I may say so, the Courts have a duty to our clients also.

We have addressed in this instance to Atlas [25] Corporation, which your Honor may recall is stated to be a co-conspirator in this action, a subpoena pursuant to a notice of taking deposition, on the expressed understanding that this subpoena would be construed to require the production

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of documents, but that no oral examination would be taken at this time. This is a procedure which antedates, I believe, even the federal rules.

I think I am not entirely sure of the origin. I think it may have been under the equity rules. It is a procedure that is so well known in the federal bar throughout the country as to need no justification, because in civil, as in criminal cases, parties are entitled to the assistance of the court in obtaining the evidence that they need, and this evidence often is documentary rather than oral.

Moreover, it is well understood, and counsel for Tool Company has certainly given us many examples of it, that the taking of the examination of a particular person on oral deposition requires the use of documentary material, to refresh his recollection, possibly to under some circumstances perhaps challenge his credibility.

That documentary material may not be in his [26] possession. It very often is not, but is in other persons' possession.

I am certain that long before the admission to practice in the court of the Southern District in New York of any person around this table, subpoenas duces tecum to persons other than those whose depositions were to be taken, have been issued directly without objection.

I am puzzled as to why it is that every time counsel for plaintiff tries to open a door to some of the rights which it has under the federal rules, it finds standing barring the way, the defendant.

As I say again, this stipulation narrowed the types of documents called for to such an extent that counsel for Atlas Corporation was prepared to sign it. I have the original here.

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I may also say that I informed personally counsel for Atlas Corporation that there was this argument, so that he could have an opportunity to be here if he wished. He is not here. He informed me he did not intend to come. I shall not try to explain why not, but he did make it quite clear that he was prepared to accept this stipulation, and [27] prepared to commence production of documents under it.

I may say that we have one oral agreement between us, and that is that because he has had some difficulty of a personal nature, production instead of starting on Tuesday, the 18th, he has requested it should start on Wednesday, the 19th, and I have told him that of course this is entirely satisfactory to the plaintiff.

We have no wish whatsoever to be burdensome on Atlas.

Sir, the good cause that I cite is the right of the plaintiff granted to it under the Clayton Act, and I do not understand what precedent gives counsel for Tool Company any standing to object to it.

The Special Master: My original inquiry was whether this stipulation as to the list of documents goes beyond the original lists that were provided for under Judge Metzner's order, and that is what I was trying to consider, because I felt that was largely the law of the case insofar as it reached into that area. I want to get that clear.

I take it from what you say it is less than that rather than anything beyond it.

[28] Mr. Tenney: Insofar as the description of documents is concerned, it is unquestionably less than that. Of course Judge Metzner's order did not refer to documents in the possession of Atlas Corporation. That is why I have

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had some difficulty in answering the Special Master's question. This schedule is not encompassed within Judge Metzner's order. For that reason it is in terms of the types of documents requested narrower in many significant respects, and in no respect, I believe broader.

The Special Master: Thank you.

[29] The Special Master: Before you proceed, Mr. Davis, I have a couple of questions I would like to ask Mr. Tenney.

Mr. Tenney has furnished me the copy of the record for October 25, 1962, at 10 a.m., of the argument and inquiries that occurred there, and I think in light of Mr. Bradner's remarks, and Mr. Tenney's concerning this, that it would be wise at this point to insert in the record that portion starting with Mr. Sonnett's remarks on page 64 down through on page 68, just before the statement of the Special Master "That is right," which covers what Mr. Sonnett said on the matter and what I said.

It refreshes my memory as to what happened. I don't know whether you have had a chance to read it again.

Mr. Tenney: I have not read it again. I am going by recollection of what happened. I read it at the time.

The Special Master: Mr. Sonnett said he thought in light of the Court's order that I had plenary control over the proceedings as well as to whether or not he would have any right to follow this procedure, and that was why he was making the inquiry.

[30] Mr. Tenney: I stand corrected. I stated it somewhat differently before.

The Special Master: I think your view probably is different than he expressed about the control of this situation,

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but it was raised at that time, and the only particular matter that I had in mind at this time was whether you were going beyond the type or list of discovery that we had followed before.

I notice that I also said that it would be subject to any party raising objection on the ground of harassment at the time, so such authority as was granted was expressly subject to that right in any party to this proceeding.

That may have been beyond my authority, under the law, but that is the way I provided at the time.

Mr. Tenney: Yes, sir, and I had understood that this hearing this afternoon was to consider a motion by a party, Toolco, in accordance with that instruction.

The Special Master: I do have an inquiry, Mr. Tenney. I gather from your argument that you do feel badly aggrieved about the arrangement for the depositions in various orders of the Court and the Special Master, and you have a right to that feeling, and [31] conscientious representation of your client.

I have difficulty trying to reconcile your contentions with going ahead and getting something done in this case. It seems to me that your argument logically would either "when we start Mr. Hughes' deposition, then the Tool Company can notice depositions all over the country and you have to be there too."

I don't see how you can have an orderly court process if there isn't some recognition that TWA does not have unlimited counsel, doesn't have unlimited funds—even the Metropolitan, which I suppose is the largest aggregation of property here, can't conduct litigation as though there wasn't any money involved in expenses.

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So the Court has to try to regulate it that a reasonable relationship can be had.

That doesn't solve your problem of whether the plaintiff should be delayed this long. I appreciate that. But it does seem to me that somewhere we have to find an effort to limit how much of this can go on at the same time. Maybe you can tell me how that fits in with your thinking.

Mr. Tenney: Yes, sir, I am very glad to express my views on that. It is always a balance of conveni- [32] ence bearing the necessity of justice in mind.

There are undoubtedly certain key witnesses in any litigation, even one as complex as this one. For a witness whose testimony is obviously crucial to the determination of the case, undoubtedly counsel in chief for the parties closely affected would wish to attend themselves. I feel sure that their desire would be so mutual in that, that there would not be any need for applications to the Court to prevent them from taking other depositions at the same time.

However, there are other kinds of procedure in pre-trial discovery. There are many witnesses that are not that important. I recall at one time in the Ferguson case there were at least six depositions being taken simultaneously. Counsel in chief, I don't believe, was attending any of them.

There is also the question of the extent to which a deposition should be permitted to go on from a time standpoint, and I think that the question of concurrent depositions, and whether that is unduly burdensome on the parties, or alternating depositions, and whether that might be unduly burdensome on an orderly attempt to develop the fact by one of the parties, changes as time goes on.

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[33] I think that is recognized by the present provision of Rule 26 with its 20 day proviso, and by the present provision of the Southern District Civil Rules with a 40 day proviso.

Times change. Within limits I think probably it is a very sound rule that the defendant in the ordinary case at least, not knowing too much about the complaint brought against him, should be given a first right to inquire, but if that first right to inquire is dragging on, there comes a point where some decision has to be made for the protection of the other parties.

That decision is clearly within the discretion of the Court, and in this instance, of course, your discretion, Mr. Rankin, I believe.

It could take the alternating deposition route, and that would be, I should think, particularly appropriate for key witnesses.

I should think, for example, that having completed the principal officers that counsel for Tool Company has chosen to notice initially, of TWA, Mr. Tillinghast, Mr. Rummel, Mr. Cocke, Mr. Leslie when he was originally noticed, although now he is no longer an officer—it would be a realistic and reasonable exercise of discretion to suspend and allow counsel [34] for TWA to take the key person—the key person in this entire litigation, indeed, Mr. Hughes—and I would think it realistic and reasonable to provide that that should be the only deposition going on at that time, just as the only actual oral depositions that have been going on in this last year have been those conducted by counsel for the Tool Company.

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I don't think that that automatically becomes something like the Laws of the Medes and Persians.

Possibly this might be as much as counsel for TWA needed to establish a major part of its case. As Mr. Sonnett has explained to you, we believe it will be. Conceivably we might want to request permission to go on with some others, but we certainly could not go on indefinitely, and this case would never come to trial if there was no limit placed on the number of depositions to be taken, particularly when it is, I think, fair to say seldom any real motivation on the part of a defendant to press for an early trial.

I would think that as this case moves on towards trial, a time would come when Mr. Davis' very expert assistants could conduct depositions in his absence.

Mr. Cook has appeared as counsel here. He is certainly a lawyer of great experience and ability. [35] Mrs. Lea, Mr. Cox have argued important motions, have prepared important documents. I see no burden on Tool Company to have a portion of the pre-trial discovery handled by Mr. Davis' assistants. That would be very likely to be the case, for example, if concurrently Mr. Davis were permitted to take the deposition of one of the witnesses he has noticed, and TWA were permitted to take the deposition of someone other than Mr. Hughes.

I should imagine Mr. Davis would like to have his entire force present when Mr. Hughes was being deposed.

Perhaps Mr. Davis could examine the witness he had noticed, and Mrs. Lea could protect the rights of the witness we had noticed.

In the case of a third party witness, she would not even be needed to protect that third party's rights. If he needed

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protection he could obtain counsel. I don't think that there is anything in this procedure to date that would indicate any disposition on the part of the plaintiff at any rate to unduly oppress or harass or deprive a third party of his reasonable rights.

That is my best answer, sir.

[36] The Special Master: There is one other thing. I notice that Mr. Sonnett in asking if he might proceed in this manner said that the documents he would request would be only very key documents. Do you recall that?

Mr. Tenney: Yes, sir, I think I am familiar with this.

The Special Master: Do you consider that is all you are requesting in this stipulation?

Mr. Tenney: I believe this is a very narrow range, yes, sir. Some of these documents undoubtedly will be more important than others. It would not be practicable to identify documents with a qualifying phrase "important documents." We find it necessary for the protection of Atlas Corporation to describe the documents by date, by addressee, by so forth, by general classification. It is a narrow range of documents. We consider them to be key, which is why we were willing to restrict it to such a narrow range, and I believe it is sufficiently narrow for a full protection of the rights of the people most concerned with the difficulty of producing them, that is, Atlas Corporation.

At least they have so indicated by signing the [37] stipulation.

The Special Master: Mr. Davis?

Mr. Davis: Mr. Rankin, I recognize that Mr. Tenney is capable of outdoing me in brevity. I don't think that I will take the time, in view of the lateness of the hour, to address

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myself to the general philosophical expressions as to the application of the rules and the rights of the defendants, or of a plaintiff in any kind of situation, of which there can be many, and which we have argued on many occasions when the issue was really before the Special Master, or before the Court—the right of a defendant to find out from the plaintiff what he is talking about, in some terms which are understandable so as to adequately put the defendant on notice what the claim is.

I don't believe that the rules contemplated that a lawyer, however well intentioned may subject the defendant and a lot of other people to burdens that are involved in this kind of a lawsuit, and still refuse to answer interrogatories or refuse to participate in Rule 16 procedures which will require counsel, since the client apparently doesn't know, what is the basis of the contention that the antitrust laws have been violated.

[38] I would like to address myself to the issue before us today, which is really not as involved as what has been discussed today.

First of all I would like to make this point quite clear.

The Hughes Tool Company was not consulted, and is not a party to this so-called stipulation. Obviously if Atlas Corporation, TWA, or anyone agree among themselves to exchange documents, we, the Tool Company have no standing, and so far as I am concerned, it may happen every day of the year.

My standing here relates only to the asserted right to documents pursuant to a proceeding which has taken place in this action. My understanding is, and I would like to be corrected at this point if I am wrong, that this so-called

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stipulation is not an agreement between Atlas and Mr. Dudley, or TWA, or between counsel for Atlas and the Cahill firm, relating to what documents they will voluntarily produce or not voluntarily produce, but rather it is merely an agreement that was arrived at which substituted a schedule to a subpoena which was served pursuant to a notice for the taking of the deposition of Atlas.

Am I correct?

[39] Mr. Tenney: The stipulation speaks for itself. I think you are correct.

Mr. Davis: In other words, the situation before us is, and irrespective of what rights may have been waived, that we have a notice for the taking of the deposition of Atlas, and predicated upon that notice for the taking of that deposition, a subpoena duces tecum was issued, and that the original schedule purporting to describe what documents were to be produced at that deposition pursuant to that subpoena, was amended by an agreement between counsel for Atlas and counsel for TWA.

That is the situation to which I am addressing myself.

I think it is important, however, to correct Mr. Tenney in the suggestion that the prior orders of this Court have not clearly and firmly established the manner and the order in which depositions were to be taken in this action, whether they are to the liking of Mr. Tenney or my liking, I think, is immaterial.

We do know that there are applications which have been made which have been ruled upon by the Special Master, and reviews pending before Judge Metzner with respect to the manner in which this [40] pre-trial discovery procedure is to be conducted in the future.

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I am not going to revert to the length of time for a number of reasons—the number of deposition days we have been engaged in, I don't think require my comments at this time. We have not been a year on depositions. A year has elapsed—more than a year has elapsed—for a number of reasons.

I don't think it is necessary for me to go into those at this time.

Judge Metzner's order—I am referring to the one of March 5, 1962, contains the following:

“At the outset of the litigation last summer defendant Hughes Tool Company obtained priority in the deposition discovery procedures.”

That is what Judge Metzner said in so many words. Then he refers to the fact that it has been assigned, and then my recollection is that Judge Metzner ordered that the Tool Company would continue to take depositions of those people noticed pursuant to the original notices of the Tool Company, which was TWA by certain individuals, and a number of others, and that after that had been completed, TWA could engage in discovery procedures.

[41] Thereafter the additional defendants could, and thereafter the Tool Company could resume. In that same order, as I recall it, the Tool Company was limited as to the area which it could cover in its discovery procedures.

Whether or not Mr. Dudley would like to persuade the Court to change the order, the manner in which these depositions have been taken—I know he has a right to apply to the Court. I recognize whenever there are changes in circumstances, upon a showing of a need, that the Court will undoubtedly listen.

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There is no question this record is full of repeated efforts to change that order. I don't understand what Mr. Tenney is referring to by saying that this situation is to be controlled by the rules as though there had been no orders of the Court, because there have been.

Reference has been made to the procedure that the Tool Company followed. It is true the Tool Company is merely following—following the service of this complaint, did serve notice for taking depositions, and did serve subpoenas duces tecum. It was that which was the subject of these prior orders of the Court.

[42] The effort that was made at the time the complaint was filed under seal, an effort was made to obtain the right of the plaintiff to examine Mr. Hughes before the Tool Company could examine, and that was denied. If they want to apply again, they can apply again, but let us recognize what the record is.

What are the rules which are applicable here? Before I go into that I should point out, as I think everybody recognizes, that Judge Metzner in one of his orders establishing the manner in which pre-trial proceedings were to be conducted in this case, and in the exercise of his discretion, did permit the plaintiff and the additional defendants to obtain documents, broad categories, as reflected by the various schedules that were attached to the applications—notwithstanding the right of the Tool Company to pursue with its oral examination, depositions, without interference.

That is what I understood the situation to be, until recently when counsel for TWA began to serve some notices for the taking of deposition of a number of witnesses which

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had heretofore never been listed by anyone, and obtaining subpoenas duces tecum for the production of documents in connection with those depositions.

I understand they are referred to sometimes as dry depositions, in the sense they were willing to waive the right to take oral examination.

I have previously stated that I was not inclined to object to any procedure which would give counsel for TWA, or even counsel for the additional defendants, any additional documents that they had not obtained in connection with the Rule 34 motion which had been made and which was granted, so long as it did not impose upon us any unreasonable burden, or annoyance, and so long as it was contained within reasonable limits.

That is still basically my position, not because of any desire to be generous, but for the very simple reason I would like to be in a position of giving to these people all documents they can possibly find anywhere in anybody's hand so they can answer these interrogatories which I want answered.

Therefore I am reluctant to do anything or take any position which in any way would interfere with an opportunity to answer these interrogatories. I would like for them to have all these documents.

[44] At the same time there are limits to what I am prepared to do, when the rights of either my client, or persons associated with my client, or mine are interfered with in a manner which to me is without conceivable justification.

The history of this is that because they served a notice for the taking of the deposition of Mr. Hughes long before they had any right to commence the taking of depositions

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of anybody, but presumably so that they would be in a position to serve a subpoena upon Mr. Hughes, they also took the position that they ought to have an opportunity to get documents and begin to prepare themselves for the time when under some court order yet to be obtained, they would be in a position to conduct some oral examination, and I do not question the right they have to obtaining from wherever any documents exist, whatever document they need in preparation for that date.

I want to point out that TWA is making no showing of a need for the production of any documents at this time, unless it is for the purpose of answering interrogatories.

As to my standing, to take a position with respect to this subpoena, I respectfully submit that [45] whether or not there is an argument they are proceeding under 34 or 45, they have the same standing, because 45 refers to 30(b), and I am seeking a protective order under 30(b), and 30(b) says that after noticing is served for taking a deposition, upon motion seasonably made by any party, or by the person to be examined, and upon notice and for good cause, I may obtain a limiting order, and that is the basis upon which I am applying, in addition to the fact that I construe the existing orders of the Court to have limited the right of TWA to proceed without leave of Court.

I believe that the record to date, and certainly the statements made by Mr. Tenney's partner, Mr. Sonnett, which appear at page 68 of the transcript, clearly recognizes that situation—at least I thought it did.

The prior orders of the Court in this case and Rule 30(b) is the basis upon which I am appearing and objecting to these notices and attached subpoenas.

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The only one at the moment which remains unresolved is this one directed to Atlas Corporation.

What is it in fact I am really objecting to? It is not so much the procedure of what is being [46] worked out between Mr. Tenney and whoever is representing Atlas in this matter, although I must say that if there is not some indication as to where the limits are of this kind of a procedure, I would be burdened.

The fact of the matter is that I do have the assistance of Mr. Cox and Mrs. Lea, but there are a great many things to be done also, which I believe Mr. Tenney understands a lot better than he indicated in his description of how things could be done if he had his way.

My objection to the schedule relates to the perfectly unreasonable and unjustifiable description or attempted definition of persons associated with Hughes Toolco or Hughes Aircraft, which appears in the footnote 1 to the schedule.

If that is construed merely as indicating that any communication relating to the subject matter covered by the schedule, by any of these named persons for or on behalf of the Hughes Tool Company, or anyone reasonably associated with this action, I would have no objection.

But if you take this definition literally, it calls for all writings relating to communications between or among any of these named people, and I [47] point out a number of them are counsel, lawyers. I am one of them.

I do not know, and I do not believe that so far as I am personally concerned there are any communications relating to jet aircraft or airplanes, and flying machines, and all systems, engines and component parts, which I have ever written on behalf of anyone else, which are in

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the possession of Atlas Corporation, although it is conceivably so.

For a long period of time when I was a member of the firm of Simpson, Thacher & Bartlett, I did represent Atlas Corporation, and I do not know what letters or communications I may have written to an officer or employee of Atlas Corporation relating to the affairs of I don't know who.

I haven't any idea what Mr. Bautzer, or Mr. Cook, Mr. West, Mr. Richard Gray, or some of the others—or what communications they may have had among them relating to matters wholly unrelated to any conceivable asset of this lawsuit.

I wrote a letter for the purpose of getting some kind of confirmation that that was not the intention. There was no intention to annoy, harass or embarrass any of these listed individuals under the device of [48] seeking documents needed for some understandable purpose in connection with this lawsuit.

Then I refer to Paragraph E of this schedule. All of these sub-paragraphs are covered by this footnoted item, in individuals that I have mentioned.

E refers to any transaction or contemplated transaction, proposal or negotiation between Northeast or Atlas on the one hand, and Hughes or Toolco on the other hand, for the acquisition or proposed acquisition by Hughes or Toolco of any stock, debentures, notes, evidence of indebtedness or other securities of Northeast, or the guaranteeing or endorsement by Toolco or Hughes of any loan by any financial institution to Northeast, or the furnishing by Toolco or Hughes of additional securities for any such loan, whether as an accommodation or otherwise.

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The period of time covered is from 1956 to date, to the date of this subpoena.

We do know in this complaint, on the basis of facts which no one can ever disclose, it is claimed that part of this alleged conspiracy was an effort to obtain control of Northeast, even though the testimony to date indicates—I am not so sure, but I think the pleadings themselves recognize that what is there [49] referred to was the submission of a proposed agreement to acquire control of Northeast, subject to stockholder's approval, of both TWA, a majority of the minority stockholders of TWA, and the Northeast stockholders, but also approval of the CAB.

We all know that Section 414 of the Federal Aviation Act specifically excludes from the provisions of the anti-trust laws a transaction covered by a 408 proceeding.

Everyone here knows, and counsel for TWA, better than anyone else, because Mr. Ordovery sitting here participated in the sense of being present, that there was a 408 proceeding before the CAB, relating to the acquisition of control of the Tool Company of the Northeast, which was approved by the CAB, which is now a final order by the CAB, and which relates to transactions involving efforts of the Tool Company to give financial assistance to Northeast up to now, arrangements which are being made currently with banks, and accommodations which are being made providing funds to Northeast, and I submit to you, Mr. Special Master, that this appears to be an effort to go and inquire into the affairs of Northeast and of the Tool Company, which is frankly and clearly and [50] admittedly outside the scope of this complaint, no matter how you construe it.

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It may be that Atlas Corporation does not care as to what they make available or don't make available.

I submit to you there is no conceivable justification that I can recognize, and there has none been advanced by Mr. Tenney with all the talk that we heard about why the prior court orders are improper, that justifies that effort.

We do know that there was for a long time discussions, and presumably a discharge of their fiduciary obligation, these TWA directors should be considering Northeast.

I think it is a matter which is of record without going into any privileged communications or discussions—that information with respect to Northeast and its affairs is a matter that may be of some concern in the business area.

If TWA is interested in details with respect to some of Northeast's affairs, it may be that we would be willing to let them have the information. But not under the so-called guise for the noticing of notice of taking depositions, then making it dry, and [51] obtaining a subpoena duces tecum, and approaching it from the point of view of having a right under the guise of this lawsuit.

I will close by merely pointing out that I am prepared to consider voluntarily any agreement that is worked out between TWA and Atlas for the production by Atlas of any documents, or group of documents which anybody believes that any conceivable relationship to alleged violations of the antitrust laws, but when it comes to attempting to annoy, harass or embarrass the Tool Company or any of its affiliated companies—Hughes Aircraft, for instance, which is named here.

I don't represent Hughes Aircraft. They know since Hughes Aircraft Company is wholly unrelated to the Hughes Tool Company.

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The laughter may be funny to you, Mr. Marshall Cox. It is not funny to me. Nothing will be funny to me until you and your firm have the courage to disclose the justification for the complaint you filed.

I submit that on the state of the record to date, and without showing more justification than I have heard here today, the Tool Company does have the right to object to a procedure in this proceeding, [52] in this lawsuit, under the sanction of the existence of this complaint, under the umbrella of the orders of this Court, to do what they are seeking to do by this proposed notice and subpoena.

The Special Master: Mr. Tenney.

Mr. Tenney: I should like to ask you, Mr. Rankin, to bear with me for a moment, because I agree that much of the discussion that Mr. Davis and I have engaged in as to prior orders of the Court is not really germane to the issue here, but it is important discussion, nevertheless, because I think I must not leave the statements of Mr. Davis unchallenged.

Mr. Davis has referred to a statement by Judge Metzner. I believe the date of it was March 5th—outlining the history of the case to that time, in which the phrase is used that "Toolco secured priority at the commencement of the action."

That is a description of what occurred and must be taken in the light of what did occur, and of the rules as they then existed.

It is true that counsel for TWA attempted to secure permission to take the deposition of Mr. Hughes before any depositions were taken on behalf of Tool Company.

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[53] This under the Federal Rules and in the light of the time that this attempt was made, it being immediately following the institution of the complaint, and in the light of the fact that new Civil Rule 4 had not been adopted, which would at least have changed the situation after a period of forty days, had it been adopted at that time, this did require, as I say, consent, and it was not obtained. It was denied.

That resulted in counsel for Tool Company being permitted to start taking depositions before counsel for TWA could. This is in a sense priority.

The key point that I was trying to make earlier is that this is not a determination of an absolute priority which I believe really would have been unprecedented in this district.

It was a limited priority. It applied to what was before the Court at that time—before my connection with this case—I think it was before Judge Herlands.

Moreover, the reference that Mr. Davis made was to a historical statement, not to an ordering paragraph by Judge Metzner. I think that is significant too.

I think the significant things about those orders [54] are that the orders themselves were quite limited. They did—the evidence of the past year shows this—they did undoubtedly permit counsel for Tool Company to commence taking examinations and to continue taking examinations while counsel for TWA was not permitted to do so, pending some further order.

But that is quite a different thing, I submit, from a determination that counsel for Tool Company had a right to continue to do so for an indefinite period of time as an absolute matter.

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The order has to be limited to what was before the Court. The schedule of depositions to which Mr. Davis referred almost simultaneously is part of a different order, actually, and it does not contain a single word about priority.

It contains a schedule of depositions, all of which would have been completed by now if that schedule had been complied with.

The Special Master: It would seem to me, Mr. Tenney, that Judge Metzner made it very clear that the Tool Company had secured priority because he recited the history, and in reciting the history he proceeded to say he did not grant that priority, that it had already been determined by other judges of the Court [55] before the case reached him, as I recall the order.

Mr. Tenney: That is correct, sir.

The Special Master: Then he proceeded to set out the order in which depositions should be taken.

It seems to me in his order of July, in which he modified the order insofar as, particularly, the additional defendants were concerned, he said that it wasn't necessary to have Rule 4, that the Court always had that discretion to determine a change in the order of depositions, and that he conceived that the Special Master had so construed his powers, and that was an inherent power. That is the way I read it.

Mr. Tenney: Yes, Mr. Rankin, I quite agree with you on that. My problem is that counsel for Tool Company has not so construed these references to priority. Counsel for Tool Company has attempted to erect these things into some absolute right that can only be taken from him with his consent, which I am quite sure he will not give.

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I was going to address myself to the more recent orders of Judge Metzner just for the moment again, because I think it is most unfortunate to have these statements as to what they mean to go unchallenged, [56] when I disagree with them.

I think the July 12th order of Judge Metzner, and the orders entered in September—actually, there were some directions in the course of colloquy on September 6th, and a formal order entered on September 21st.

I think it is impossible to read those orders without concluding, as I have concluded, that contrary to what counsel for Tool Company says, there is now an order of the Court calling for the early examination of Mr. Hughes.

At the moment the original date having been set by the Court, being October 29th, which is now past, and the Special Master having set February 11th, a date which is on appeal, and subject to the application that I have given notice I intend to make for changing that date to January 14th, this may seem a little bit not directly important right now, but its importance for the future is very great.

Mr. Davis constantly by mis-characterizing these orders on the record creates an aura in which the orders are intended to be absolute, which they are not.

I would like to address myself more directly to [57] what is before the Special Master at this moment. The difficult thing with Mr. Davis' position is that the documents that are requested are not his documents, or the documents of his clients.

The subpoena is not addressed to them. The subpoena is addressed to Atlas Corporation—documents in their possession.

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It hardly seems worthwhile emphasizing that difference, but Mr. Davis devoted so much of what he had to say to it, that I suppose I must go over it again.

His clients have no property right in those documents. No letter from the counsel that he referred to, to Atlas, possibly affects any attorney-client privilege of any of his clients.

If there could possibly be an attorney-client privilege, it would be that of Atlas. It is always waivable, as far as that goes, by Atlas.

As to Mr. Davis' personal position, I think he may not have noticed—I would like to call his attention to the fact that in consideration for the fact that he might personally find this somewhat troublesome because of his past connection, perhaps with Atlas, we have made a special limitation of date as to documents coming to or from Chester C. Davis, so [58] it applies only to documents after May 22, 1961, which I submit, illustrates our desire not to raise any difficult questions with anyone, but to stick to what we have a right to get.

These documents, I submit, are clearly within the scope of the complaint. I do not see how anyone can challenge that, although I recognize the fact that Mr. Davis has challenged it. There is no basis for that challenge.

Moreover, the limitations of relevancy are primarily intended for the protection of the person to whom a subpoena is addressed, unless there is demonstrated some actual attempt to harass Mr. Davis' clients—and it is excluded by the nature of the proceeding—he has no right to talk about relevance.

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We have, as counsel for TWA, the right and the duty to try to determine ourselves what type of evidence we will be able to submit, to try to obtain evidence that will be admissible, and in that, to extend our search beyond the precise limits of admissible evidence, so as to get documents that may produce other documents that may be admissible evidence.

[59] The Special Master: What about the Northeast documents? Can you tell me, Mr. Tenney, why those are requested?

Mr. Tenney: Northeast, and the relationship between Northeast, and TWA and Tool Company, is a central matter in this litigation. It occupies a substantial portion of the complaint. The documents which we expect to get from Atlas, we hope will be extremely useful in establishing the charges that we have made as to Tool Company's activities in connection with Northeast. That is Point 1.

Point 2. I believe that the activities of Tool Company in the procurement and supply of aircraft to Northeast are of profound significance in determining the nature of the business that Tool Company was engaged in, and particularly in the light of some of the antitrust issues that are presented in this lawsuit, in the light of the duPont case, involving the activities of a supplier who is also a major stockholder of its customer.

Moreover, sir, it seems strange that counsel for Tool Company never refers to the fact that there is a non-antitrust cause of action in this complaint. The third cause of action is not under the antitrust [60] laws.

If there is, which I do not believe to be the case, an available exemption to Tool Company from the application of

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the antitrust laws to its wrongful conduct with respect to TWA, that exemption is clearly not applicable to the third cause of action.

But [what] counsel for Tool Company would like to have the Special Master and the Court do is accept, before he proves it, before he establishes it, that he has, or his client has a complete defense to this action.

If there is a complete defense to this action, and it is upheld by the Court, the action is terminated, and the plaintiff no longer has the right to seek to develop evidence to prove its claims.

Until that defense has been proved, the simple assertion by counsel for the defendant that he has a good defense does not deprive the plaintiff of its right.

We have to go ahead and prove this complaint, and we intend to do so, and we think the means that we are using at the present time are reasonable, and are most certainly not any kind of harassment.

The Special Master: I am wondering about information as to financial transactions, recent [61] financial transactions with the Northeast—how they are involved in this litigation. Maybe you can help me on that, Mr. Tenney.

Mr. Tenney: The complaint here charges a continuing wrong. It is not ended on June 30, 1961. There are allegations in that complaint, and applications for injunctive relief, that are continuing.

We are not fully aware of what Tool Company's activities with respect to Northeast have been. We believe that we can establish, if we are given an opportunity, that in the past at least, and we can get to the past in many instances from the present, those activities have involved a

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violation of the rights of TWA, cognizable at equity in the historic stockholders' suit, involving a misappropriation by a majority stockholder of rights belonging to the corporation as such, and in our judgment, cognizable under the antitrust laws as well.

Those are continuing. It is a seamless web really. I don't see how you can place a date of limitation on just when we can find evidence relevant to this scheme and plan and past conduct of Tool Company.

I would like to emphasize again, Mr. Rankin, [62] that these are documents in Atlas' possession, not documents in Northeast's possession. We are asking for matters that have already been disclosed by Northeast, in the case of the particular documents that you referred to, to Atlas Corporation. There can be no question of privilege there.

The Special Master: There could be harassment if you are asking for things that you may be entitled to later, but not at this time, in light of getting key information for the purpose of taking Mr. Hughes' deposition.

Mr. Tenney: I might mention also cross-examination of Mr. Leslie, which in the light of the direction made this afternoon, has been postponed, of course. We consider that this material may be very useful also in connection with the cross-examination of Mr. Leslie.

As far as harassment goes, I am sorry, sir, I don't see who we are harassing. Mr. Davis says he would like us to have documents, but he sure won't let us do anything about getting them.

Atlas has not claimed harassment.

As to Hughes Aircraft Corporation, which I apologize for laughing about, it is our belief [63] that Hughes Aircraft Corporation is a creature of Mr. Hughes.

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The Special Master: If the footnote was construed as Mr. Davis was suggesting, how does that limit you in the way it is objectionable?

Mr. Tenney: The sneak phrase he put in there is acting on or on behalf of Mr. Hughes. I do not want there to be a determination prior to our examining these documents, whether a particular associate of Mr. Hughes, among that group name, was in connection with a particular communication in the Atlas files, was acting for or in behalf of the Hughes Tool Company.

The ways of the Hughes Tool Company and Mr. Hughes are sometimes strange and mysterious. The only way I can identify the documents I need are by addressee, addressor designations. It means that Atlas Corporation does not have to make a decision as to who Mr. Davis was acting for after May 22, 1961, when he wrote a letter to Atlas Corporation. They are entitled to assume, as I do assume in fact, that he was acting for whoever he was acting for—these documents are relevant and significant to this litigation.

[64] I emphasize there is no attorney-client privilege at all.

The Special Master: Even if they relate to someone else—the mere communication of address and addressor would be controlling?

Mr. Tenney: There is another non-conclusory limitation. Relating directly or indirectly to jet aircraft, including but not limited to airplanes and flying machines, and all systems, engines and component parts of such jet aircraft, and the financing thereof to summarize some of the remaining language.

We are not asking for things that don't have something to do with this litigation.

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I should also like to call your Honor's attention again to the letter which we wrote you—addressed to Mr. Rankin by Mr. Sonnett—on November 8, 1962, which has actually been marked as an exhibit so as to get it on the record. The authority cited there, I think, established that contrary to Mr. Davis' assertion of a right to plead harassment because the documents requested from third parties are not in his view germane to the action—his standing is very limited indeed. The case of Shepard and Kassel makes it clear [65] he can't plead another party's harassment. It is either his own, or the other party should plead harassment.

The Special Master: I construe that when I said this could be done, it was conditioned upon any party being able to object. I said at the time I considered that part of it—whether or not his claim of harassment is valid, is something else—but I did recognize any party to this litigation granted the right in this manner, which I construed was out of turn in light of what I thought was the priority schedule of Judge Metzner, was subject to the right of any party to object at the time, on the ground of harassment or the burdens that were imposed upon them.

I indicated then and still feel that you should have an opportunity to try to advance your case if we can carry on the other activities, as the Court has directed, must have priority. I want to try to find out how we can get that done without an unreasonable burden. That is why I was asking particularly about limiting the demands or the production to such documents as would relate to the Hughes Tool Company. I do not recognize Mr. Davis' claim about the aircraft company. I assume when he says that the [66] ownership was transferred in 1956, that it is a fact that

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he will establish or try to establish later in the proceedings, which is something that he shall have an opportunity to do. But up to that time that you have a right to inquire into it, and find out how valid it is, and what happened in regard to it—at least as long as it was part of the Tool Company, it is part of the issues involved from 1939 up to that time.

So I have thought that the Hughes Aircraft Company is a reasonable inquiry at least within certain limits.

I don't want to foreclose you, Mr. Davis.

Mr. Davis: On the Hughes Aircraft, Mr. Rankin, to my mind it is no more of a problem than what Mr. Tenney keeps overlooking. First of all this footnote does not relate merely to subparagraph A, but all the subparagraphs of the schedule, because it is a definition of associated persons. The problem that arises there is the possibility, of which I am not aware, of communications between these various people relating to something else, which for one reason or another may be in Atlas' possession.

The main point, however, is on this Northeast [67] situation. That gives rise to the statement by Mr. Tenney that of course if we were in a position at this point to obtain a ruling of the Court on the validity, continuance of this complaint, all of its rights would disappear.

In that connection I want to emphasize the fact that no one here can seriously question, and I can assure a Special Master and a Court that it is our intention that as soon as we have the answers to interrogatories, we will have that question before the Court.

There have been rulings by the Special Master that these interrogatories are to be answered. Once those interroga-

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tories are to be answered we will understand the area of issues as to which documents may be relevant or pertinent.

The problem we now have is the effort on the one hand to determine what are reasonable requests, what are reasonable burdens based on this vague reference of issues.

Mr. Tenney is saying about Northeast Airlines, and the dealings and transactions relating to Northeast are the essential parts of the case. I don't understand what that means.

[68] I certainly don't understand what the financial arrangements of which Atlas was necessarily a party, since up until the transfer of its majority ownership of Northeast to the Tool Company, pursuant to the CAB order—they were a party to all these various transactions, and banking arrangements currently being discussed, negotiated and arranged for.

I don't think there can be any question about the validity of the 408 proceeding before the CAB, and the legal effect of those proceedings without arguing the matter at length.

The reference to the third cause of action refers to a wilful and malicious interference into the affairs of TWA—how this Northeast matter can have any bearing on this—is beyond my understanding what this schedule and subpoena is all about.

May I suggest, Mr. Special Master, that the rights of TWA to proceed for discovery of additional evidence, of documents in this matter, since apparently it is not related to their ability to answer interrogatories—that the matter be held in abeyance until we have a ruling by the Court on the matters now pending before it, as to the obligation of

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TWA to answer interrogatories now on what is really the practical answer to [69] all these burdens that are being imposed on a great many people, and a lot more—this is no assurance yet, that after having had gone through this procedure with Merrill Lynch, First Boston, Mr. Henry Crown, Mr. Atlas, and this will go on indefinitely.

May I suggest that a possible answer to this entire problem will be found after we have an appropriate determination by the Court, where the matter is now pending, as to the obligation of the plaintiff at this time to disclose by answer to interrogatories, or pursuant to the other matter which is pending before the Court—the application for the Rule 16 proceeding—so that the area of the issues will be defined.

The motion to dismiss can then be scheduled for argument and disposition, and having that behind us, then the rights of the plaintiff, which Mr. Tenney is so anxious to protect at this time, will then be fully and adequately protected.

I still haven't heard a reason why it is of any moment or importance to TWA or its counsel to have what they are seeking now, and more particularly I still have not heard a rational explanation of what it is—they are familiar with the complaint—the [70] contentions what is the conduct of the Tool Company or Atlas or Northeast that violates these antitrust laws—how it is that the arrangements or accommodations that the Tool Company may have given to Northeast, or is currently giving to Northeast, all of which was the subject of a 408 proceeding before the Board, and approved by the Board, and now that the Board has determined that it is in the public interest, and

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outside the scope of the antitrust laws, for the Hughes Tool Company to acquire control of Northeast, how it can be that the allegations of this complaint include or cover some kind of violation of the antitrust laws by reason of our dealings relating to Northeast. This is something I am still unable to understand, but undoubtedly when these interrogatories are answered, the Court will be in the position of determining just what is the legal justification for counsel for TWA, and the present management of TWA to use the funds of TWA in the manner they are being used, and to impose a burden upon the Tool Company and others by reason of the continuation of this lawsuit.

I submit that a possible sound disposition of this question might be made after we have a clearer [71] understanding of what is involved in this complaint, and presumably the decision of the Court, either on the Rule 16 motion, or in connection with the interrogatories, will give us the answer.

Mr. Tenney: We find ourselves, Mr. Special Master, talking about things here, again and again, which are not apparently directly germane to what is before you. Now the interrogatories. The reason that this is so, sir, is that what is here before you is an attempt by the plaintiff to proceed to prepare its case, as I submit, it has the right to do.

Counsel for Tool Company is opposed to the plaintiff developing evidence in support of the case.

He has various things now pending, each of which would be a major obstacle in the plaintiff's preparation of the case.

The interrogatories is one of them. The interrogatories were not drafted to be answered. They were drafted to be

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unanswerable. We have tendered evidence that it would take six men over a year at TWA alone to prepare answers to a portion of these interrogatories.

We have offered a witness on that subject, and will call him when and if the Court desires to examine [72] into the accuracies of that representation.

The significance here, of course, is that counsel for Tool Company wishes to postpone as long as possible, forever, if possible, any development of the affirmative case of the plaintiff. Obviously therefore counsel for the Tool Company would find it extremely reasonable to delay any decision on this very simple matter, until some future time when innumerable other things would have presumably been decided.

One thing that would definitely be decided by that procedure would be that plaintiff would have been forbidden to conduct its limited discovery to try to establish the allegations of the complaint.

On behalf of TWA I object to any delay in the determination of this matter. I believe that we are entitled to this information. I believe that we have asked for it in such a way as to avoid any possible harassment of counsel for Tool Company, or interruption of the proceedings that counsel for the Tool Company is engaging in—any of them.

The Special Master: I am ready to tell you my thoughts in regard to the matter, and possibly it may be necessary to delay a definitive order until [73] Monday if the suggestion that I may make cannot be worked out by counsel for the parties.

I think you are entitled to a ruling, and I am quite reluctant to delay the matter and appear to be trying to

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pressure the Court into an earlier ruling than he would otherwise make in regard to the matters that he now has on review. I think it is my duty and function to try to decide the matters that come before me the best that I can, and as they reach me from time to time, and let the Court handle his own business in his own way, without any action of mine appearing to be awaiting some action of his.

I have generally considered that Judge Metzner's orders had granted certain priority to the Tool Company, and that Judge Metzner has made it clear that he felt that he had the discretion to change that priority, and that the Special Master had such a discretion and had exercised it in the past, and that Rule 4 was merely a recognition of that inherent discretion in the Court.

I also have construed that while Judge Metzner provided for certain priority on depositions, that he also wished or made orders that caused me to think that he wished the parties to have available to [74] them the documentary evidence that might assist them in the preparation of their cases, even though they were not authorized under the order of the Court to proceed immediately with the oral examination of their witnesses.

I recognized in the record when Mr. Sonnett made inquiry, that he could make the limited discovery that he was requesting, which he said would be limited to key documents by this dry deposition procedure, and if you will recall, when the matter was before me concerning Merrill Lynch, and First Boston, I said explicitly that the decision in those two matters should not be considered as a precedent for any similar proceedings, and particularly would I examine any later proceedings as to any undue burden or harass-

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ment. I believe that the plaintiff is entitled to obtain the documents at this time subject to some reasonable limitations, and I am disposed to sustain the motion of the Tool Company insofar as it purports to extend the footnote in such a way as to reach documents not related to the Tool Company, the Hughes Aircraft Company, and Mr. Hughes, and as to the Northeast Airlines insofar as it would reach out beyond key documentary material relating to the [75] Northeast Airlines. That is, that I consider you are entitled to documents that will assist or might lead to relevant evidence concerning the activities of the defendants with relation to Northeast Airlines in regard to some of the allegations of the complaint.

So I suggest that if counsel prior to noon Monday can agree upon some limiting language, I will be pleased to accept that, and if that is beyond your ability, I will enter an order that I will draft myself at 2 o'clock on Monday, generally sustaining the right of the plaintiff, but limiting it in the respects that I have indicated.

Mr. Davis: Could you make it a little later than Monday noon, because I don't intend to work with counsel over the weekend.

The Special Master: Mr. Tenney, do you have any objection to it going to the close of the day on Monday?

Mr. Tenney: I have no objection to the close of the day on Monday, sir. I see no real difference from my standpoint on that.

May I ask for one point? Perhaps you might comment as to what you mean by "key documents," sir, because I find that it might be rather difficult for [76] Mr. Davis and

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I to agree, since I am sure that he would think a document that I thought was quite important would be entirely irrelevant.

Mr. Davis: No, Mr. Tenney. You identify any group of documents which you think support the contention of the violation of the antitrust laws, you can have them.

If you are trying to go into the area of what the aid or assistance or banking arrangements or accommodation of the Hughes Tool Company gave to Northeast during that period, starting, I think, in September of 1961, the various matters presented to the CAB, which culminated in that 408 proceeding and the order of the CAB, I do object to it.

If you are referring to Northeast documents in the so-called period prior to, up to and including the discussions, conferences or efforts that were made to develop a merger agreement to be submitted, between TWA and Northeast; May 1958, 1959 or 1960—if that is the period, you can have them all.

The Special Master: I think it might help if counsel would try to agree—if they would each submit to me by 4:30 on Monday, his suggestions limiting the language of production. What I had in [77] mind was what Mr. Sonnett said when he said "key documents for the deposition of Hughes, to wit, documents constituting or relating to communications from Hughes or on behalf of Hughes to others, on certain subjects which would be a narrow but exceedingly important range of documents to have for his deposition."

He was defining to me at the time when he was asking for this authority, and that is all I can turn to, is what he said.

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I don't mean to limit you precisely to that language, but something that would fit in with the spirit of it.

Mr. Tenney: I will see what we can do, and make such suggestions as I am able to. Perhaps Mr. Davis will favor me with his ideas during Monday, and I can look at them.

Mr. Davis: You are the plaintiff, Mr. Tenney.

The Special Master: If you can't agree, exchange your proposals, at least.

(Whereupon, at 7:00 p.m., the hearing was closed.)

**Special Master's Ruling on Toolco's Motion to Depose
Sessel and Wadsworth, December 28, 1962**

[18762]

* * *

The Special Master: I am ready to rule on the motion of the Hughes Tool Company for a direction that following the completion of the present examination of E. O. Cocke, Tool Company may on the completion of the deposition of A. V. Leslie, or in conjunction with his staggered deposition, next depose Ben-Fleming Sessel, and the Irving Trust [18763] Company by Sessel, and Arthur L. Wadsworth and Dillon, Read & Company, Inc., by Wadsworth.

I consider it necessary first to review the record. I shall therefore refer briefly to the prior orders of Judge Metzner and the Special Master in this case.

The priority of Tool Company in the taking of depositions herein was recognized by Judge Metzner in his order of February 7, 1962. In setting the schedule for the taking of certain depositions by the defendant and the plaintiff and fixing the time for taking all depositions noticed by the defendant first, and the depositions noticed by the plaintiff in the order that Judge Metzner entered. That was the effect of his order.

In his order of March 5, 1962, Judge Metzner recognized this priority by stating:

"At the outset of the litigation last summer, defendant Hughes Tool Company obtained priority in the deposition discovery procedures."

However, he then went on to say:

"While the courts have adopted a normal rule of priority, depending on time of service of a notice

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to take deposition, and the necessity for a defendant [18764] to obtain particulars of the charges leveled against him because of the notice form of pleading, such rules are not rigid in their application, and must yield in unusual circumstances to the ultimate goal of prompt orderly and fair disposition of the litigation.

"Furthermore, the plaintiff who instituted the litigation must not be lost sight of in the maze that has resulted from the pleadings.

"The service of a notice to take depositions six months before answer cannot afford the defendant Hughes Tool Company the right of priority insofar as its counter-claims are concerned."

In the order just referred to the Court allowed the Tool Company to continue its schedule of depositions.

"Limited, however, to evidence which bears on plaintiff's claims against Hughes Tool Company."

He further provided that then the plaintiff should proceed with its schedule of depositions "In the order provided in the pre-trial order of February 7, 1962."

He also authorized the additional defendants to either participate in the depositions conducted by the plaintiff, or by separately scheduling depositions to follow those taken by the plaintiff.

He further provided that at the conclusion of those [18765] proceedings by the additional defendants Hughes Tool Company was to resume and complete its depositions.

On the appeal from the order of Special Master denying the motion of the plaintiff for an order determining that

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Rule 4 of the Civil Rules of the United States District Court of the Southern District of New York was applicable in this case, the Court said:

"Irrespective of Rule 4, the Court has the power to vary any order heretofore entered fixing priority of deposition—discovery proceedings."

Judge Metzner allowed the plaintiff to renew its motion before the Special Master on September 20, 1962, saying:

"If at that time it is advised that the depositions scheduled upon the completion of the Tillinghast deposition are not moving as expeditiously as possible, and that any further delay in the taking of the depositions of the defendant would be prejudicial to the plaintiff."

In his September 21st order Judge Metzner passed upon and approved the interpretation and conditions expressed by the Special Master as to the binding effect of the subpoena, for which Chester C. Davis, on September 6, 1962, accepted service on behalf [18766] of Howard R. Hughes, obligating Mr. Hughes to appear as a witness for the taking of his deposition. This was to be taken in the United States District Courthouse for the Southern District of California, in Los Angeles, on September 24, 1962, or at any future time that the Court might direct for the taking of Mr. Hughes' deposition pursuant to the subpoena.

Such action was subject to the penalty of grave sanctions which the Special Master stated in his order.

In the same order the Court approved and affirmed "The ruling of the Special Master denying the application of the plaintiff to proceed with the deposition of Howard R.

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Hughes on September 24, 1962, to the extent that the return date of September 24, 1962 contained in the subpoena served upon Howard R. Hughes is adjourned by order of this Court to October 29, 1962, at the same time and place.

Judge Metzner further said:

"The Tool Company may apply to the Special Master on October 22, 1962 for a further adjournment of the date now fixed for the deposition of Howard R. Hughes."

On October 25, 1962, I passed upon the application [18767] of the Tool Company for a further postponement and set the return date for the subpoena for February 11, 1963.

My order is now on appeal before Judge Metzner.

I wish to refer to my order of October 25, 1962, and so clarify it in this order that there may be no valid basis for misunderstanding it.

In that order I found that all parties had cooperated in the production of documents, and that the Tool Company had diligently proceeded with the discovery proceedings in taking depositions.

I had suggested an application for a Rule 16 pre-trial proceeding to aid in defining and sharpening the issues in this case. The Rule 16 question is now before Judge Metzner.

I set over the return date of the subpoena for Mr. Hughes to February 11, 1963, "and provided that the return date for the notice to take depositions and the subpoena be adjourned to that date, and that the deposition be taken at the same time and place."

Thus, I indicated, and I now wish to remove any doubts about it, that I set the date with the intention and expecta-

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tion that the deposition would start at [18768] 10 o'clock on that morning and proceed until it was concluded according to law.

I postponed the date to the time I designated to allow for action in several respects which I described at length. I took into account the witnesses that I thought could be completed by that date, or if not, I planned that there would be an interruption of their depositions.

I named such witnesses as Mr. Cocke, Mr. Leslie and Mr. Breech. In my announcement I referred to the opportunity for the Tool Company to present any motions reaching the question of whether the Court had jurisdiction of the subject matter, and a motion to dismiss the action in the intervening period.

I have overruled motions attacking the interrogatories served on TWA, so as to provide the full benefits of the rules to aid discovery in the interim.

I took into account the people involved and the requirements for moving them as well as the necessary documents and records.

All of this was done in order that there be no doubt left that it was my purpose and intention to proceed with the taking of the deposition of Mr. Hughes by the plaintiff beginning February 11, 1963 [18769] at 10:00 a.m. in Los Angeles, at the place designated in the notice.

I was trying to exercise a judicial discretion in recognition of the need of the defendant to obtain the particulars of the charges leveled against it, and of the further fact that a year will have elapsed by February 11, 1963, since the defendant began taking depositions.

I believed then as I do now that in the light of the discovery that has occurred, the defendant will not be affected

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adversely beyond the exercise of a reasonable discretion in light of all the facts to interrupt the taking of depositions merely by allowing the taking of the deposition of Mr. Hughes by the plaintiff.

I also determined that in fairness to the plaintiff it should be allowed at such time to take the deposition of the person by whom plaintiff's counsel have repeatedly asserted they expect to be able to establish 75 per cent of their case.

I considered that the ultimate goal of prompt orderly and fair disposition of this litigation would be substantially advanced by such interruption, and I reaffirm each and all of those conclusions.

[18770] I am now denying the application and motion of the Tool Company to depose Mr. Sessel and the Irving Trust Company by Mr. Sessel, and Mr. Wadsworth and Dillon, Read & Company, Inc., at any time prior to the taking of the deposition of Howard R. Hughes, which is to begin on February 11, 1963, as indicated above.

I do not think it would advance the proper administration of this case since it would in my judgment inevitably branch out into the issues of the counter-claims, or result in such continuous controversy as to the exact limits of such issues that it might interfere with the taking of Mr. Hughes' deposition at the time and place fixed.

Are there any questions?

Mr. Davis: I take it this also covers a denial of the application to take that of Mr. Wadsworth?

The Special Master: Yes. I think I should provide for a prompt time for a review of this order before Judge Metzner if anyone wishes to do so, in light of Mr. Sessel's problems, about trying to go on his trip.

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Mr. Davis: May I understand in the light of this ruling, the scheduled depositions which are available to the Tool Company?

[18771] The Special Master: Yes. Mr. Cocke's deposition is set to continue on January 2nd, to the extent that he is to be given a full opportunity to extend each and every question with regard to the years 1959, 1960 and 1961.

Mr. Leslie is to return on January 14th, and continue through that week, and we then reserve the question about what to do with him after that.

If the Court should rule on Mr. Breech, and I feel that while I suggested that he could be deposed as part of TWA's people in my prior ruling, that the Court had that matter or has that matter, at least, under its jurisdiction for determination.

If the Court should determine that he could be deposed, then he would be available.

I want to make it clear that I would expect to interrupt any deposition on February 11th to proceed with Mr. Hughes. I don't want to leave any doubts in your mind, or anybody else's, so that if you feel that that is any modification or change of any prior orders that you wish to seek to review, that you fully understand it, so far as I am holding, that I expect to proceed with Mr. Hughes on February 11th.

Mr. Davis: I have no other question. I would [18772] like to inquire, however, if it would be acceptable to suggest a postponement of the resumption of Mr. Cocke from January 2nd to January 3rd. Mr. Cox and I have been occupied since the last time we have been here, on briefing in the Delaware action, and are proposing to travel out of the city on this forthcoming weekend.

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Mr. Cocke may return on January 2nd with a refreshed recollection, but counsel will not be refreshed on January 2nd, particularly if he travels on New Year's Day in order to return here.

The Special Master: I would be disposed to grant that request.

Is there any reason why Mr. Cocke could not be produced on the 3rd?

Mr. Tenney: Not so far as I am aware. I assume that will be all right. I will be in touch with him. I am not sure I can reach him right at this moment. We would have no objection to that as far as TWA, separately from Mr. Cocke.

The Special Master: We will plan on it then for 10 o'clock on January 3rd.

Mr. Davis: Would you undertake to inform Mr. Cocke?

[18773] Mr. Tenney: I will undertake to inform Mr. Cocke.

If there is any hitch in that, I will let you know, Mr. Rankin.

The Special Master: I would like to suggest that for any review of this order, the papers be filed with Judge Metzner by 10 o'clock on Monday.

Mr. Davis: I think that is impossible.

The Special Master: With your problems and all?

Mr. Davis: Yet we ought not to be asked to do it before January 3rd.

Mr. Chanler: Why wouldn't it be possible for Mr. Davis to file the same papers he filed before you, sir?

Mr. Davis: Because I have something entirely new and different now. I have something entirely new and different in the way of a ruling of the Special Master to which I want to address myself.

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Mr. Chanler: That affects Mr. Sessel?

Mr. Davis: Yes. What I want to review now is this order.

The Special Master: It is a very short time, and unless there is serious objection, I would tend to grant Mr. Davis time to January 3rd, at 10 o'clock, [18774] in the light of the holiday period that intervenes.

Mr. Stewart: Service to be made on other counsel at the same time?

The Special Master: On all counsel, yes.

I also at this time direct the reporter to send a transcript promptly to Judge Metzner, of this proceeding this morning.

Are there any other questions?

Mr. Davis: I have none.

The Special Master: We will reconvene on January 3rd.

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[24686]

[CAPTION]

BEFORE:

HON. CHARLES M. METZNER,
District Judge.

[24688] [APPEARANCES:]

* * *

[24689] The Court: The Court has a number of matters pending. The Court has indicated to counsel that it desired argument on several of them this afternoon. But for the record there is an appeal pending by TWA pursuant to a telephonic request to review an order of the Special Master adjourning the deposition of Howard R. Hughes to February 11, 1963. Yesterday counsel for TWA filed an application to withdraw this appeal based upon the transcript of the hearings before the Special Master on October 25, 1962, and October 28, 1962.

Second, we have an appeal by Hughes Tool Company dated January 3, 1963, seeking to review an order of the Special Master denying Toolco's application to examine Ben-Fleming Sessel and the Irving Trust Company by Sessel and Arthur L. Wadsworth and Dillon, Read & Company by Arthur L. Wadsworth upon the completion of the deposition of A. V. Leslie or in conjunction with his staggered deposition.

Thirdly, we have a motion by Hughes Tool Company pursuant to Rule 16 of the Federal Rules of Civil Procedure, authorizing and directing the Special Master to conduct pre-trial conferences, with recommendations for the form

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and terms of a pre-trial order defining and limiting the legal and factual issues [24690] in this case.

Fourthly, we have an appeal by Hughes Tool Company dated September 19, 1962, from an order of the Special Master directing the Tool Company to produce for inspection and copying by opposing counsel the documents with respect to which Hughes Tool Company claims attorney-client privilege.

Fifth, we have an appeal by TWA pursuant to a telephonic request to review an order of the Special Master denying its motion to quash or strike interrogatories served by Toolco on October 11, 1962.

And, finally, we have an appeal dated December 20, 1962, by TWA from an order of the Special Master overruling TWA's objections to the further interrogatories dated November 13, 1962.

Obviously, there is no need to hear argument on item number 1 regarding the adjournment of the deposition of Howard R. Hughes to February 11, 1963, since TWA has withdrawn that application.

There is no need to have further argument on the application by Hughes Tool Company for an order directing the Special Master to have pre-trial conference hearings pursuant to Rule 16 of the Federal Rules of Civil Procedure.

[24691] There is no need to have argument on the appeal by TWA to review an order of the Special Master to quash or strike the interrogatories served by Toolco, since that was argued on October 29, 1962, and the final papers were submitted on November 7th.

I see no necessity for argument, unless counsel wishes it, for the appeal by TWA from an order of the Special Master overruling TWA's objections to the further interrogatories, since I assume the same principles will be argued

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on that item as have been argued on the original motion to strike.

Mr. Sonnett: We would rest, your Honor, on the prior record, plus the short brief served this morning.

The Court: I received that this morning.

Mr. Sonnett: Yes, your Honor.

The Court: I suggest then, Mr. Davis, that you start off on your application to review the order of the Special Master denying your application to proceed with the depositions of Sessel and Wadsworth.

Mr. Davis: Your Honor, preliminarily I would like to make some corrections on the papers which we submitted in connection with that application. Referring first to my affidavit——

[24692] The Court: Just a second. I have gone through all these in the last four days. Now I will have to go find it.

Mr. Davis: This is the last paper I filed, your Honor.

The Court: Your affidavit or Mr. Cook's affidavit?

Mr. Davis: That is correct, looking at my affidavit first, your Honor, you will note that following page 16 at the end of the affidavit there is annexed as Exhibit A excerpts from the testimony of Mr. Cocke. Yesterday Mr. Cocke made some corrections of a typographical nature which do change the sense of what he was saying, and I would like at this point to make two small corrections.

The Court: Where do they appear?

Mr. Davis: First at page 55 of Exhibit A, your Honor.

The Court: Yes, I have it.

Mr. Davis: Page 55, you see in the answer of Mr. Cocke where he said, "I said, and I repeat that I expressed the opinion that Mr. Hughes, to use my own words, was afraid of a deposition."

The Court: Yes?

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Mr. Davis: He wants to insert the word "not." [24693] He wants to express the view that Mr. Hughes was not afraid.

The Court: Was not afraid.

Mr. Davis: That is what he testified to yesterday. And then at page 65, in the next to the last full paragraph, the line beginning:

"I don't recall who made the decision that it should be deferred because it wasn't on the agenda."

He wants to insert the word "not" between "should" and "be." So it reads:

"I don't recall who made the decision that it should not be deferred because it wasn't on the agenda."

The Court: All right.

Mr. Davis: One more matter, your Honor, in connection with the affidavit of Mr. Cook, Mr. Cook annexes as part of his affidavit a letter from Mr. Sessel to a Mr.— I will give you the exhibit number— I think it is Exhibit A of the affidavit. It is a letter of April 16, 1958, by Mr. Sessel to Mr. Engelman.

The Court: I have it.

Mr. Davis: That, your Honor, is a copy, or, rather, is a transcription by one of our reporters of the document found in the Irving Trust Company files. [24694] At that time we didn't have available to us a photostatic copy of the document itself as found in the files of the Irving Trust. That, however, was made available to us yesterday afternoon. I would like to hand to the Court at this time a photostatic copy of the document that we did find in the files of the Irving Trust. To my knowledge there

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is no difference between the document itself and this copy, but I would prefer that for the record.

The Court: Have you given a copy to the other side?

Mr. Davis: All of them have a copy, because the document was produced during yesterday's deposition and all counsel were there and obtained in due course a copy of everything that was produced. I have extra copies here if anyone wishes one.

Mr. Sonnett: There is no correction in the date of the letter; it is still written in 1958.

Mr. Davis: Yes.

The Court: You may proceed, Mr. Davis.

Mr. Davis: Now, your Honor, there is one other matter which I would like to call to your Honor's attention and have the record reflect. The question was raised before the Special Master by Mr. Barr, and I am [24695] calling it to your Honor's attention, and that is that a substantial portion of what appears in my affidavit and Mr. Cook's affidavit was not before the Special Master at the time he made his ruling which is now under review. In other words, the testimony of Mr. Cocke subsequent to December 18, 1962, and which we have in our exhibit as an excerpt beginning at page 13, namely, the excerpts from Mr. Cocke's deposition beginning at page 13 of Exhibit A, and that is following January 3, 1963, wasn't before the Special Master at the time of his ruling. Exhibit B to my affidavit, however, was at one time an exhibit to a brief which was filed with this court and a copy of which had been furnished to the Special Master, and, therefore, in one sense it may be deemed that he would have been aware of the existence of that letter, even though it was not specifically referred to at the time he considered and decided the application which we made for the taking of the deposition of Mr. Sessel.

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Now, going to the affidavit of Mr. Cook, the letter of April 16, 1958, which I just handed to your Honor, a copy of which is marked Exhibit A to Mr. Cook's affidavit, that was not before the Special Master at the time of his ruling.

[24696] Exhibit B, being a memorandum found in the files of the Equitable signed by Mr. Oates, was not before the Special Master. Nor was Exhibit C, which is a memorandum from the files of Equitable by Mr. Keehn, dated December 29, 1960.

Now, the next document, Exhibit D, being the notes of a telephone conversation between Mr. Sessel and Mr. Gordon, of the Bank of America, was an exhibit which had been used during the course of the depositions. Mr. Cocke had not testified with respect to that exhibit as he did on January 3rd and following. But that document was one which was part of the record and, therefore, it may be assumed that the Special Master was aware of its existence.

Exhibit E of Mr. Cook's affidavit, which is a memorandum of Mr. Keehn dated July 7, 1965, furnished to us by Equitable Life, was not before the Special Master at the time of his ruling. He became aware of it subsequently.

Exhibit F, which are the notes of a telephone conversation or notes of Carver relating to a telephone conversation between Mr. Gordon and Mr. Sessel, was marked as Defendants' Exhibit 117 and was a document which was made part of the record at the time of the **[24697]** Special Master's ruling, but, of course, Mr. Cocke's testimony, which, to some extent, relates to the same subject matter was not before the Special Master.

Now, if your Honor please, I do not want to take the time of the Court or burden the Court by repeating to the Court what I know has been previously and adequately presented to the Court and unquestionably considered by

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the Court. There are relatively few things which I feel desirable to point out to the attention of the Court if I assume that your Honor has had an opportunity since yesterday to review my affidavit and that of Mr. Cook.

I appreciate the fact that I was late in filing that affidavit. Mrs. Lea and I stayed up to 4 o'clock in the morning to get enough time, but, mechanically, I got a little fouled up and I could not get it filed any sooner than I did. If I may assume that your Honor has had an opportunity to review the material which is presented in these two affidavits, I can limit my remarks very briefly.

The Court: I have read them.

Mr. Davis: First, I would like, then, to emphasize a matter as to which I am sure my opponents will advert to, and that is the length of time which the [24698] Tool Company has been on depositions, and even the reference of the Special Master that on February 11th it will be approximately a year that he has been sitting as a Special Master. In fact, the Tool Company has had 80 witness days during that period of time, 80 days during which we examined a witness. During that time I have had a computation made by my office, and I am informed that only 80 per cent of the pages of transcript taken during those 80 days are in Q and A form. The rest has been spent in colloquy or points being raised by one of the various counsel. On each day of these depositions there have been a number of counsel present, and each, of course, has been afforded full opportunity to either make objections, comment on the objections, or make remarks. So that based upon the number of pages of the transcript taken during those 80 witness days I find that only approximately 66 per cent of those transcript pages are devoted to Q and A. That would reduce, in effect, the taking of questions and answers from witnesses to 53 days.

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The further fact that I would like to call to your attention is what has transpired since October 25, 1962, which is the date, if your Honor will recall, when the Special Master ruled with respect to the objections [24699] of TWA to answering these further interrogatories.

8 The Court: You mean the first interrogatories on October 25th?

Mr. Davis: That is correct, and at the same time it is the time when he ruled upon the application as to the further adjournment of the return date and taking of the deposition of Mr. Hughes, where the Special Master in fixing the advance date of February 11th made certain comments as to what he assumed could take place during that period of time.

Subsequent to that date the Tool Company has had 25 witness days, and based upon the pages of transcript during those 25 witness days we find that approximately 82 per cent of those pages were devoted to Q and A.

I mention that, your Honor, only for the purpose of putting into proper focus what it is that the Tool Company has been doing.

The Court: What is the status of the depositions of Cocke and Leslie?

Mr. Davis: I stopped at the deposition of Mr. Cocke when I said that, "I have no further questions of him at this time." The Special Master felt that it would be desirable to give Mr. Cocke an opportunity [24700] to refresh his recollection and testify further. As to the manner in which it was to be done, the Special Master suggested that his remarks should be kept confidential and under seal, and if your Honor would like to have more information with respect to that——

The Court: Have you now finished with Mr. Cocke?

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Mr. Davis: No, I have not. I have been requested—maybe I should say it has been suggested, if not requested by the Special Master to review once more with Mr. Cocke his testimony covering the years 1959, 1960 and 1961 so as to give Mr. Cocke an opportunity to further expand and elaborate on his prior testimony.

The Court: Wasn't he supposed to do that on January 3rd?

Mr. Davis: It started on January 3rd, your Honor, and it has not been completed. First of all, a number of things happened during the course of Mr. Cocke's testimony with respect to the production or lack of production of documents. There is a good deal involved. A good deal of time was taken up in that connection. And, as I say, I have submitted to you excerpts from Mr. Cocke's testimony subsequent to January 3rd. Yesterday I would say that he testified approximately an hour and a [24701] half. The rest of the day was spent in trying to untangle this production of documents question which has arisen, what has been produced and what has not been produced.

The Court: How about Mr. Leslie?

Mr. Davis: Mr. Leslie testified to the financing which took place in the year 1958. Then he asked that he be excused from further testimony because of his commitments and obligations to Douglas, the year end financial statements coming up, and his return date has been adjourned for one reason or another, and as of the moment he is scheduled to return on January 21st.

The Court: Isn't it the 14th?

Mr. Davis: It was the 14th.

The Court: The transcripts I read before the Special Master said January 14th.

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Mr. Davis: You are quite correct. However, either yesterday or the day before the Special Master informed us that he is scheduled for argument before the Supreme Court of the United States, which is scheduled for that week. And so yesterday we all received a letter which was confirmed that we would resume our depositions on January 21st with Mr. Leslie.

【24701】 The situation with respect to Mr. Leslie is Mr. Leslie has asked that he be required to come to New York only when there could be a full week devoted to him. The matter is left in abeyance as to what the ruling of the Special Master may or may not be as to the availability of Mr. Leslie for that one week which is presently scheduled.

The Court: How much time do you have with Mr. Leslie?

Mr. Davis: Your Honor, it depends almost entirely as to whether or not I may assume that a decision will be made with respect to the appeal which TWA has taken as to interrogatories. There is nothing which transpired subsequent to 1958 other than the 1960 financing which is the heart of this controversy as referred to by Mr. Cocke. Whether I shall take the time to go through the details, and it would be a very detailed examination, because there were extended negotiations with a great many complications taking place during 1958 and 1960. However, from the point of view of the antitrust law, which is all I am addressing myself to or trying to address myself to, there is very little that I can really hope to obtain from Mr. Leslie, other than putting him through basically the 【24702】 same area that Mr. Cocke testified about in what appears as Exhibit A, because, as your Honor knows, for some time, in fact, I believe, from the first day that I appeared before your

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Honor, I indicated that it was my plan and expectation to bring on an appropriate motion to dismiss as soon as we were in a position to do so.

The Court: You have made six references to that before the Court, starting September 1, 1961.

Mr. Davis: I am surprised it is as few times as that, your Honor, and I am sure it is a burden to have me repeat my position so many times. But it is basic to the issue which I think is confronting us, and, basically, the position of the Tool Company is if it is to have or is entitled to any right to discover what a complaint is about, we have not had it yet, because we still do not know.

It now appears from the examination of Mr. Cocke's testimony, and something which I think was to be suspected before I examined Mr. Cocke, but I could not make the assertion, and that is there is no one at TWA, unless it is Mr. Sessel, and I doubt Mr. Sessel knows any facts which justify violation of the antitrust law. Certainly, his letter just handed to you suggests just [24703] the opposite. I don't think there is anyone at TWA knows any fact supporting that.

In that respect, counsel have asserted the work product privilege, which they have a right to assert. The only thing I know of as to how a defendant may find out, if he is entitled to find out, if you assume he is entitled to find out, the only way in these circumstances a defendant is going to be able to find out what this complaint is about or what the course of conduct of either Hughes or the Tool Company of which TWA is complaining about, may be by means of interrogatories or a Rule 16 proceeding, which will require TWA corporate-wise to answer at least questions based upon whatever knowledge that has been accumulated through its various agents or agencies.

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[24704] On this advice question, your Honor may know or may not know that in the course of the depositions of Mr. Tillinghast that the attorney-client privilege, not the work-product privilege, between the Cahill firm and TWA was waived in the presence of a third party, namely, counsel for the voting trustees. There was a detailed discussion of the complaint, the legal theories involved, and presumably whether the facts justify or do not justify whatever the complaint is about. There was also furnished the minutes of the executive committee meeting of June 29, which the Special Master has also ruled to be an independent and separate waiver of the attorney-client privilege. So we are not handicapped by the attorney-client privilege insofar as I can now examine any witnesses who had any conversations with counsel with respect to the subject matter of the complaint, although we are at odds, that is, the Cahill firm and I are at odds as to the scope or extent of that waiver, and the Special Master has ruled so far that the waiver has taken place, and the extent of the waiver is yet to be determined as we proceed.

However, the Cahill firm has still asserted the work-product privilege, whatever memos they have [24705] prepared. Apparently, the only person who has given them any memo of any facts is Mr. Rummel. That would seem to be the conclusion from Mr. Cocke's testimony, and certainly based upon the record, the excerpts of which I have not added to Exhibit A. It would seem that the only writing in existence which identifies or describes whatever transactions are involved are the so-called Rummel notes with respect to it. With respect to the financing, there are some handwritten notes of Mr. Leslie and there are other notes of Mr. Thomas, all of which have been produced.

Before I leave this question of interrogatories, your Honor, I understand that counsel for TWA's main objec-

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tion from a legal point of view to answering these interrogatories is the assertion that interrogatories may not be served while a party is engaged in oral discovery.

The Court: I think that is in the sole discretion of the Court whether or not they shall be served.

Mr. Davis: That may be the proper answer, your Honor. What I would like to say at this point, your Honor, is I am perfectly willing as I indicated [24706] in my argument before the Special Master, and I want to say it here also, to suspend oral discovery for the purpose of obtaining answers to my interrogatories.

The Court: What else do you have to say about Mr. Sessel?

Mr. Davis: With respect to Mr. Sessel, I think there can be no question from the facts which I have assembled and tried to present to you in these two affidavits that if there is a single person who does have knowledge of what, in fact, took place during the period 1955 through 1960, which counsel for TWA has asserted on a number of occasions is the period of the acquisition and financing of the jet aircraft, the period which involved the so-called negotiations for the Northeast merger, if there is a single person who knows those facts from all sides and angles, it would be first Mr. Sessel, of the Irving Trust, who during that period was not only the leading banker for TWA, but also the principal banker for Mr. Hughes and the Hughes Tool Company, who was a director of TWA, who participated in all negotiations and decisions that took place during that period. And, secondly, if there is any other person who compares to Mr. Sessel, it would be Mr. Wadsworth, of Dillon, Read, [24707] Dillon, Read, who were the principal architects of the so-called Dillon, Read plan, which was on

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and off, and finally was consummated in 1960. And if we are to be required to continue the taking of oral depositions for whatever period of time the Court determines is the right which we have or to comply with whatever right the Court previously determines we have, I submit that we ought not be handicapped or restrained as to who we take on next.

In this respect I would submit to your Honor a decision by Judge Weinfeld in *Haynes v. Columbia Pictures Corp.*, 16 F. R. D. 118, 124 (S. D. N. Y. 1954), quoting from what appears in that opinion. As I understand, the facts in that case, your Honor, involved a question as to whether diversity of citizenship existed, and the plaintiff was examining the defendants, some of whom were residents of California and some residents of New York. Apparently controversy arose as to which he ought to examine first, and the Court had occasion to say:

"... There remains the defendants' final request that the examination of the California residents be deferred until the conclusion of the [24708] depositions of the New York residents.

"Absent unusual or compelling circumstances, an examining party should be permitted to examine witnesses or parties in the order he deems best calculated to disclose evidence or leads pertinent to the subject matter of his claim or defense. No sufficient ground has been presented for interfering with the control which the plaintiff here as the examining party would normally exercise in the order of the examination."

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The Special Master's ruling, however, seems to have been predicated upon, first, the fact that in connection with the implementation of the first decision by Judge Herlands with respect to priority the Court annexed a schedule to its order. That schedule consists of nothing more than a notice of the taking of the deposition served by the defendants immediately following the filing of the complaint. I believe I have said more than once that in serving those notices for the taking of deposition there was no intent on the part of the Tool Company or its counsel to follow any particular scheme, nor had it any idea as to what would be the best way in which [24709] to determine whatever evidence was to be developed. Mr. Sessel and Mr. Wadsworth are on that list to which priority was established, and the only question which is to be raised in that connection is that their names do not appear immediately following that of TWA.

The Special Master also seemed to be concerned with the fact that he had determined that Mr. Hughes' deposition was scheduled to take place on February 11, and it may be inferred that he felt by the time that Mr. Leslie was concluded and Mr. Cocke was concluded, then the time lapses which were bound to occur, that nothing worthwhile might be accomplished prior to February 11th, and, therefore, in that sense no particular harm to Toolco, if you assume that Toolco's depositions or discovery is to be interrupted, and is to be interrupted before this Court has satisfied itself that it has jurisdiction over the subject matter of this action.

[24710] I respectfully submit, your Honor, that the facts presented to the Court by these affidavits and by the testimony of Mr. Cocke, and if your Honor has had an opportunity to review even hastily the testimony of Mr.

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Rummel, I submit that the conclusion is inevitable that there is at least a very, very serious question as to whether or not the claim that TWA is asserting is properly a claim under the antitrust laws. I respectfully submit to your Honor that we are confronted with the necessity of satisfying ourselves as to the basis for the jurisdiction of this court before a plaintiff may subject a defendant to what TWA is seeking to do with respect to the deposition of Mr. Hughes, quite apart from the admissions of TWA with respect to the testimony of Mr. Cocke, which I have annexed as an exhibit to my affidavit, portions of which I would like to particularly call to your Honor's attention.

Now, I say, your Honor, that even if we were to assume that the CAB did not exist or that if exemption from the application of the antitrust laws did not exist, I am talking now simply as to whether or not there is a course of conduct by the Tool Company which is related in any way to the violation of the antitrust laws.

[24711] The Court: Mr. Davis, we have gone through this several times. You are arguing a motion for a summary judgment.

Mr. Davis: No. I say I want to be in a position to do that.

The Court: But you will never get to that point until you go through the proper procedures. I am not of a mind to overrule the decision of the Court of Appeals.

Mr. Davis: I would like opportunity to address myself to that question at the appropriate time if I get answers to my interrogatories which I am entitled to. We have the position of the plaintiff at that point.

The Court: You have not afforded the plaintiff an opportunity to examine and cross-examine the defendant,

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and in *Arnstein v. Porter*, *Colby v. Klune*, and in the *Bozant* case and other cases the Court of Appeals said unless you have had an opportunity of discovery of the opposing party and examination and cross-examination the Court should not grant a motion for a summary judgment.

Mr. Davis: If that is the thing that is underlying the question, I would like an opportunity to brief the question to your Honor.

[24712] The Court: I don't think you have to, because I have looked into that question on several occasions and I have done extensive research upon it and I have written upon it.

Mr. Davis: If the complaint states a cause of action——

The Court: You want to go beyond the complaint and produce the evidence that you have adduced at a deposition proceeding. You, therefore, turn your motion into a motion for summary judgment and the rule states you can do that.

Mr. Davis: Your Honor, in that connection your Honor is overlooking the provisions of the Federal Communications Act. This complaint did not say anything about a course of conduct in violation of the CAB. The admissions of the plaintiff are just as much a part of this complaint as the complaint itself.

The Court: No doubt about that.

Mr. Davis: I am talking about the testimony of TWA.

The Court: All right. Let us go on to something else, then, Mr. Davis. We have been through this several times and I have ruled on it back in March.

Mr. Davis: I recognize that you have, but a [24713] defendant is reasonably entitled to find out the course of conduct that is in the case, and I respectfully submit that I have not had that opportunity. The only thing I have

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discovered in these 80 witness days is that counsel for TWA knows what they are doing, but nobody else does.

The Court: Do you have anything else to say about Sessel-Wadsworth?

Mr. Davis: I believe that your Honor is sufficiently familiar with the circumstances which relate to this date of February 11th and how it occurred without my retracing the procedural steps that took place. That developed merely because we elected to accept the service for the subpoena of Mr. Hughes, rather than answer interrogatories, because up to this point there has never been any order of this court or finding either by the Special Master or this court that the circumstances developed justify or support the need of the plaintiff at this time to take the deposition of Mr. Hughes. There is no such finding or order of any kind. All that has happened is that rather than answer interrogatories as to Mr. Hughes' whereabouts I undertook to accept service of a subpoena in connection with the noticing of the taking of the deposition. That notice of subpoena [24714] had an arbitrary date, the same as mine had when I started to file my notices and that date has been adjourned on a couple of occasions. There has been no finding whatever of any kind by the Special Master, no finding of fact or circumstance which has developed since October 25th or any other time indicating any need at this time for the plaintiff for the protection of any rights of the plaintiff to take the deposition of Mr. Hughes or anyone else in the Hughes Tool Company.

Now, as I have indicated before, your Honor, and whether or not I succeed or do not succeed, I respectfully submit I am entitled to this and I am prepared to suspend all oral depositions if answers to these interrogatories are

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given which will be binding upon TWA and which will establish whether or not this court has jurisdiction over the subject matter of this action, and I respectfully submit that once we have answers to these interrogatories, this court, as well as defendants' counsel will know what it is we are defending ourselves against, and I ask that an appropriate decision be made as to the order of taking depositions and like related matters.

Your Honor, I would like a few minutes, unless your Honor tells me you are sufficiently familiar with the [24715] testimony of Mr. Cocke, to point out the circumstances which cast great doubts as to the true underlying reasons for having selected the course of action of filing of the antitrust complaint, which is the sole foundation for the Court exercising any of its powers. If your Honor has adequately reviewed these excerpts of Mr. Cocke's testimony, I will not burden your Honor. On the other hand, if your Honor has not had an opportunity to do so, I would like to address your Honor's attention to a few portions.

The Court: You have indicated that at the beginning of your argument and I have read your papers.

Mr. Davis: I have nothing that I think is necessary for me to add, then.

The Court: Counsel for Irving Trust Company, Mr. Chanler. I assume you are also talking for Mr. Sessel.

Mr. Chanler: Yes. The Irving Trust Company and Mr. Sessel.

[24716] As your Honor is aware, I want to remind your Honor that on February 7, 1962, you stated that the schedule of examination may be varied by the Special Master if in his opinion the circumstances require certain variances. Then again on March 5 after the counterclaim was

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filed you stated that the examinations of Toolco should be limited to the complaint and they could not examine as to the counterclaims and that since the Special Master is presiding over the depositions on a day-to-day basis, he will see to the application of this limitation.

Now, in September the question of the examination of Hughes came up, and your Honor at that time set the examination of Mr. Hughes to October 29, giving Toolco the right to file an application for further adjournments, stating the propriety of such application is peculiarly within the Special Master's competence.

Mr. Rankin, thereupon, adjourned the deposition to February 11, 1963, stating he did so in order to give everybody, particularly Toolco, ample time to complete the examination of what witnesses it then had, Tillinghast, Leslie, Cocke and Rummel, and the presentation of whatever motions Toolco cared to make to the Court with respect to various legal contentions which it had previously [24717] raised, there having been made more than six times a motion to dismiss.

Now, he made it quite plain that he intended the examination to be held, and no appeal was taken from that order of the Special Master. So that order, it seems to me, is now the law of the case setting down the Hughes deposition for February 11.

On December 4 Mr. Davis filed an application for examination of the Irving Trust by Sessel, and Dillon, Read by Wadsworth, and Wadsworth individually. That was argued at that time without any particular reference by Mr. Davis to come before Mr. Hughes' deposition. It looked as though there would be time to examine Mr. Sessel, because there was some talk about Cocke's examination soon being

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terminated and Leslie's. It became apparent while that was pending that there would be less time to examine Mr. Sessel and that there could not be more than four or five days before the Hughes deposition of February 11 during which Mr. Sessel could be examined.

Aside from that point, the Special Master in his order of December 28 stated:

"* * * in order that there would be no doubt left that it was my purpose and intention to proceed [24718] with the taking of the deposition of Mr. Hughes by the plaintiff beginning February 11, 1963, at 10.00 a.m. in Los Angeles, at the place designated in the notice."

He affirmed that was his intention. He then denied the motion to examine Mr. Sessel on this ground, among others:

"I do not think it would advance the proper administration of this case since it would in my judgment inevitably branch out into the issues of the counterclaims, or result in such continuous controversy that it might interfere with the taking of Mr. Hughes' deposition at the time and place fixed."

I have pointed out that your Honor has placed in the Special Master the discretion as to the question, first, of whether or not to vary the schedule of depositions and how to arrange the depositions, and, secondly, you have stated that the Special Master had special competence to see to the application of the limitation that there should be no examination as to the counterclaims. He has exercised that discretion.

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Now, actually, this application before your [24718] Honor of Mr. Davis is an application to request that you reverse the Special Master's decision on the ground that there was an abuse of the discretion, since your Honor left this matter entirely to the Special Master's discretion. I think it is a most extraordinary thing to ask this Court to review the exercise of discretion by a lower court, to come in and present to you a very lengthy affidavit with innumerable affidavits attached to it, none of which were presented to the lower tribunal at the time the matter was presented there.

Mr. Davis made a long speech that some of them may have been in the record, and the Special Master if he looked through this voluminous record and if he had clerks to do so, he might have found some of them. But none of this material that they present to your Honor in an effort to show that the Special Master abused his discretion when he said there would be no interruption to permit an examination of Mr. Sessel and because it might involve examination as to counterclaims, and tried to show that that is unreasonable by presenting to your Honor totally different facts and totally different affidavits. It seems to me to be a highly improper procedure.

[24720] In the first place, he has changed his grounds very substantially here. Now there being no time for an examination of Mr. Sessel, as far as I can see, because, as Mr. Davis pointed out, the Special Master has to argue a case before the Supreme Court which will take up all of this week and next week, Leslie will be on the week of the 21st, and then Cocke will be on the week of the 28th, and there will be, no doubt, considerable examination there, and the Special Master said he had a considerable number of

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questions, and by the week of February 4th we are all going to be packing up to go to Los Angeles. So that really he is now making a plain application here to ask your Honor to reverse the Special Master's order of October 25 setting down the examination of Hughes for February 11. He didn't appeal from it; he never objected to it. He never actually said that is what he is doing, but that is the only implication in his present motion. He said he wants to examine Sessel first and Wadsworth, which means there won't be any examination of Hughes in probably six or eight months.

Your Honor pointed out if he really wants to make a motion to dismiss and if it had any merit in it, the first thing is to get through with the [24721] examination of Mr. Hughes, and no such motion can be granted until that is done. He is trying to get other witnesses involved here in order to postpone the day when Mr. Hughes will have to stand up and be examined.

I submit if his application is granted we won't see Mr. Hughes for eight or ten months or a year. Then we will see other witnesses. The idea of bringing in all this Cocke testimony and all these matters before your Honor have nothing to do with the motion whatever. Moreover, he never made any such application before the Special Master. He never asked the Special Master to postpone Mr. Hughes' examination. He said he wanted to examine Mr. Sessel to find out more of these facts.

Another point I want to make clear is that these affidavits, particularly Mr. Davis' own affidavit, conclusively confirm the wisdom of the Special Master's determination that it would be inappropriate to examine Mr. Sessel because it would be impossible to disentangle questions relat-

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ing to the complaint from questions relating to the counterclaims. The burden of Mr. Davis' affidavit, which, I say, was never before the Special Master, is that he has evidence to produce, according to him, that Mr. Sessel and others were instrumental in having this complaint and this lawsuit [24722] brought with improper motives in order to take away Hughes' control and obtain control of TWA for themselves, and that it is all part of this conspiracy. That is the counterclaim. I submit to your Honor that I don't see a single subject mentioned in this Davis' affidavit where he outlines what he is going to talk about. On page 12 in his affidavit I don't see a single subject there as to which I could permit Mr. Davis to ask Mr. Sessel a question without objecting on the ground that he is attempting to examine him on the counterclaims. It may be they have some relation to the complaint, although it is a novel idea to me that in arguing that a complaint does not state the cause of action, you say it was brought in bad faith by the client who told the lawyer, "See if you can't bring a complaint that will bring about such and such a result. That has nothing to do with the validity of the complaint. This is nothing but an attempt to adjourn the examination of Mr. Hughes and to examine, if possible, Mr. Sessel on the counterclaims. There is nothing here to show that Mr. Rankin didn't act in the best of discretion, and, if anything, his discretion has been confirmed.

[24723] I would like to add one personal matter, your Honor: Mr. Sessel has been trying since last October to take a six-weeks' trip around the world, and he has had to postpone it twice, the last time on January 4th. He is leaving on Friday and he would like a decision at the earliest time, your Honor.

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The Court: Mr. Stewart, you represent Wadsworth?

Mr. Stewart: And Dillon, Read, yes, your Honor. It is very difficult to assess any kind of reply, either to Mr. Davis' argument here or to the papers, more than 100 pages, that were served on us late yesterday afternoon. Dillon, Read is hardly mentioned. There are one or two references to the fact that Dillon, Read worked on the financing for TWA which later became the 1960 financing. There is no dispute as to that. We admit that. I don't know whether to be flattered or insulted by this omission of any justification for taking the deposition of Wadsworth at this time. But one thing that Mr. Davis said I thought was very interesting, and that is, it is not at all clear that he even plans to examine Mr. Leslie, the financial vice-president of TWA who worked on this financing, as to the facts, the negotiations, the [24724] conversations that were held in connection with this financing.

I have read the Toolco papers, and the same question comes to mind, your Honor, why was Dillon, Read added in this lawsuit?

The Court: You have asked that question before, Mr. Stewart. Nobody wants to give you an answer.

Mr. Stewart: They have not done so so far. We have been in it a year and we have not had an opportunity to examine the man who is responsible for bringing these charges against Dillon, Read.

Your Honor knows that Mr. Wadsworth was the officer at Dillon-Read who was primarily responsible for the so-called Dillon, Read plan for the financing of TWA. In working on this he kept a diary, a day-by-day diary of his telephone calls, of his negotiations, his conversations with the banks and insurance companies who were the prospective lenders to TWA. The diary is voluminous. It is about

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500 pages of foolscap altogether. Toolco got that diary, your Honor, by a subpoena before Dillon, Read was named as a party defendant in this lawsuit, along with a bunch of other material. They have had it now for [24725] close to a year and a half, I believe, and Toolco admits as recently as our argument on this application on December 11 that they find nothing in this diary which casts any light as to the facts upon which TWA relies in support of its complaint. I can see this situation developing though, your Honor, with this diary and with these personal notes of Mr. Wadsworth, if the prior examinations of Toolco are any criterion, I can see an examination of Mr. Wadsworth going for weeks, months, on end.

Now, since Dillon, Read is concerned solely with the financing and that is their only part in this case, the financing of 1960 and the subsequent financings of TWA, and the counterclaims are essentially dealing with the 1960 and subsequent financings, any examination of Wadsworth could concern itself with just one thing, and that is the heart of the issues in the counterclaims.

Toolco has had priority for a year to find out what they are being charged with. They are not interested in pursuing TWA's statement that 75 per cent of their case is going to be developed on the examination of Mr. Hughes. But one thing is very certain, your Honor, they can't find out from Mr. Wadsworth what the facts are that TWA relies on in support of its complaint. [24726] Nothing he says, nothing he does not say could bind TWA in any way.

Mr. Wadsworth was not consulted in the filing of the complaint by TWA against Toolco, and I suggest that any inference that Toolco can find out from Mr. Wadsworth what TWA's case is is just sheer nonsense. He is not an

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officer at TWA, he is not a director of TWA, he is not an employee of TWA. He can't possibly know.

This file of voluminous material served on us, your Honor, just proves one point to me, that Toolco will claim anything, say anything, do anything to prevent the deposition of Howard Hughes taking place on February 11, or any other date, for that matter.

I respectfully urge, your Honor, that you affirm the ruling of the Special Master.

The Court: Mr. Sonnett.

Mr. Sonnett: I think Judge Bromley is next in our agreed batting order.

Mr. Bromley: May it please your Honor, I really think this is an attempt on Mr. Davis' part just to get rid of the Hughes examination for as long a time as he can, and I call to your Honor's attention in support of that accusation to paragraph 22 on page 15, where he says, [24727] "Toolco respectfully submits that it is entitled to priority in discovery under the circumstances here present in accordance with the prior orders of this Court; and that, accordingly, it is entitled to the examination of Sessel and others before the deposition of Hughes is taken."

[24728] Now, if you turn back to page 2 at the bottom, you will see another device in the making:

"Toolco expects shortly to bring on a separate application for appropriate protective relief with respect to the current efforts of TWA to take the deposition of Hughes before plaintiff has divulged the justification for an antitrust complaint, whether by way of answers to interrogatories or otherwise."

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Your Honor, we are making expensive and extensive preparations to go to Los Angeles confident of your Honor's decision, and if any such further devices delay this are in the making, I think he ought to do it very promptly, and if Mr. Hughes is not going to show up on the 11th, I think these gentlemen ought to tell us before we incur all the thousands of dollars of expense and all the moving out there only to find out that he does not appear.

I endorse everything that has been said and that which is now to be brilliantly said by brother Sonnett.

The Court: Mr. Sonnett, with that introduction do you want to talk or do you want to rest?

Mr. Sonnett: Judge, I am afraid to say anything for fear of spoiling it, but there are a few points that [24729] I feel I must say. Obviously, in respect of the deposition of Sessel or Wadsworth, I have no direct interest, except insofar as it impinges upon the progress of TWA's case. No doubt in due course both will be deposed. No doubt in due course both will be important witnesses on various matters.

But in respect of my problem, which becomes increasingly acute, may I say to your Honor that the needs of TWA to advance its discovery after the defendants have had a year, the needs are acute. TWA's 1962 year will show according to its president at best a break-even, more likely a loss. This litigation is expensive. When I say, as I have said and repeat to your Honor, that I expect 75 per cent of the evidence we will use at the trial to come out of the mouth of Hughes, I am not saying that rashly. I expect that. And I would like very briefly to demonstrate to your Honor why I think that is so and why I think

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we need to go forward as quickly as possible with the Hughes deposition.

We have withdrawn our application that you set the date earlier than February 11th because as a practical matter it is apparent that we could not start before that, anyway. I think your Honor will realize that we have no desire to bore you with statistics, but [24730] we have in terms of discovery in this case so far on the documentary side produced over a million pieces of paper, that is, TWA, that the Hughes Tool Company has produced 325,000, that Dillon, Read has produced 18,000, Irving Trust 30,000, Metropolitan Life, 5,000, Equitable, 35,000, Bank of America, 12,000, the Chadbourne firm, general counsel for TWA, 20,000, from the CAB files 12,000, The First Boston Corporation, 3,000, Merrill, Lynch, 2,500, Atlas Corporation, 1,000, the Mellon Bank, 2,000, Charles Thomas, a thousand—approximately 1,700,000 pieces of paper have been produced so far on the documentary side of the case.

The Hughes Tool Company has had all that and they have had a solid year, and if Mr. Davis' count is 80 days, mine is 83 of solid question and answer discovery. We have not had a day. I don't know how long Mr. Hughes is going to be around to be examined, but I do know that he is the one person who has what we need the most. We need to know the decisions at the highest level which Hughes made, and there is no mistake about it, he is the one who made them, and we need to develop out of his mouth, and we will, the reasons why he made the decisions he made.

We start out, your Honor, with a handicap by [24731] the fact that the Hughes Tool Company counsel completely disregard the discovery which they have had to date. For

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example, they would brush aside the entire Tillinghast deposition as if it did not even enlighten them as to claims concerning 1961. It does. And I think it contains very significant evidence relating to the efforts of Hughes to ram 990's down the throat of TWA at a time when the independent management for the first time wanted other aircraft, as to what Hughes and his representatives did in that connection at a time, mind you, when there was a voting trust in existence and Hughes was presumably out of control. Now they disregard the Tillinghast deposition.

They would minimize and disregard the Rummel deposition, and a reading of that record is very enlightening, because every time counsel for Hughes Tool came to an area where it was obvious the witness was going to hurt him, he backed away, and at one point it became so obvious the Special Master himself took over the questioning, because he said to Mr. Davis on the subject of whether Hughes had instructed Rummel to boycott airplane manufacturers, except the one chosen by Hughes, Davis does not pursue that, and Mr. Rankin said, "I don't think the record ought to be left that way," [24732] and he pursued it, and the witness testified that he had had such instructions. This is the man who worked with Hughes closely and intimately and knew all subjects connected with the procurement of aircraft. He was a man—and this is not a reflection in any way on him—on the payroll of both Hughes and TWA. He is a high man in his field and he is an excellent witness and is very useful in support of TWA's case.

Now, as to the production of the present set of papers quoting Cocke as to what Leslie said to him, after examining Leslie for 18 solid days they have just reached the beginning of the jet period in their examination, and counsel

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for Hughes Tool Company says to you with a straight face presumably, well, he may not want to get into that particularly. The reason is pretty obvious, because I think he had forgotten things, like the document I have in my hand, which they have had for many, many months. This is a document in Mr. Leslie's handwriting. It will be used on his cross if Mr. Davis does not use it on his direct. It was written in the spring of 1960 when both TWA and the Tool Company were on the verge of receivership because of the actions of Hughes. And in that document, among other things—I am not going to go into all of it, [24733] because, as your Honor can see, it is very lengthy—it is headed "TWA, In Appreciation"—in that document, Leslie, the man who has been on for 18 days so far, says, among other things—this is at the very beginning, under the heading of "Background":

"During 1956 Hughes Tool Company acting through Mr. Howard R. Hughes placed orders for 18 Boeing 331's, 15 Boeing 131's and 30 Convair Model 880 jet airplanes. ."

stated at the time and repeated many times since to be for TWA's use.

Skipping down:

"It was stated by Hughes at the time the orders were placed (among others the writer) that TWA was not to concern itself with the financing of this equipment as he through Toolco would find the required funds."

Later on after Mr. Leslie has been analyzing the history and the situation of TWA, he comes to the conclusion, among others that:

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"TWA with Equitable should sue Toolco-Hughes for damages due to implied contract default."

There are other discussions about TWA to assert claims against Hughes. That was in March or thereabouts of 1960. It represented the judgment of Leslie, who, I [24734] might add, at one time was in the employ of the Hughes Tool Company for some years in a financial capacity, and also with TWA. Leslie has not been asked about that. They have had this piece of paper for months. I think what this shows is that there are none so blind as those who will not see. If counsel for the Tool Company would take a look at the documentary evidence they already have, they would be very much enlightened about various of the problems that face them in this case.

Now, on the Hughes deposition and the need for getting forward with it promptly, I represent to your Honor that it is provable, and without pulling out all the documents, that it was a cardinal policy that Hughes throughout maintained that there be secrecy concerning everything. There are documents in which he instructs people, "Don't make notes of this," "Keep this a secret." As a matter of fact, there is one which is, I think, so amusing and pertinent and it is brief, that I would just like to read it to your Honor, because it comes out of the mouth of Mr. Holliday's secretary, and it is really quite a commentary on the secrecy rules which Hughes rigidly enforced. This is a letter written by Laura Lee, who is Mr. Holliday's secretary, to Mona Lee, who is Leslie's secretary.

[24735] The Court: Where does Lola Lea fit in?

Mr. Sonnett: I don't think there is a relationship, but perhaps we can judge better after reading the letter. Perhaps she is kindred in spirit. It says as follows:

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"Dear Mona Lee:

"I am trying to work up some information in regard to all of the subsidiaries of HTC and all companies in which we own stock, etc. and as usual, it isn't easy to find out the simplest information. We do carry secrecy to extremes in some cases, in my very humble opinion!

"Would you be good enough to furnish me the following on TWA: State incorporated in; date of incorporation; and the date set up for the annual stockholders meeting each year. I assume that you will not have to get a security clearance and be fingerprinted and all that stuff to furnish this meager bit of information to a fellow employee.

"Many thanks and what would I do without you?????????

Laura Lee."

[24736] When it get to a state where a secretary does not know in what state TWA is incorporated in, I think we have some idea of the extremes of the policy.

I might say that Mr. Leslie himself, for example, in 1955 in writing confirmed in a letter to Mr. Damon that the usual policy of everybody being sworn to secrecy was followed in a recent meeting with Mr. Hughes, this being the standing order of business.

Further, if one looks at these call sheets that record in part these telephone messages coming from headquarters, one is struck by the number of entries which say "Omit; they talked." It is astonishing the number of them.

But as to those fortunately that are available which were not omitted—in retrospect they wish they had

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omitted—it is probative on the subject of the motivation of Hughes for what he did here with his co-defendants, and I am not going to take a great deal of time, except to indicate that it is in this type of area that we have our problems and where the need for the testimony of Hughes is absolutely essential to the case, because he is the one who has got the information. It is not in the documents. And under his cardinal policy of secrecy, the others knew just as much as he [24737] wanted them to know, and no more.

In that connection, to advert for a minute to the Leslie view of the situation in March, 1960, his appreciation, in which he said that TWA and the Tool Company both were on the verge of bankruptcy, that TWA should sue Hughes, this is long before we came into it as counsel for the new management, that Hughes in referring to that meeting in his own words said, and I would like to read this, your Honor. Your Honor has heard it before, but I want to follow it up with a brief excerpt from one other document you have not heard, and the two together, I think, illustrate where the deposition of Hughes is going to establish all the proof of motivation that we need to sustain the conspiracy, in addition to enlightening everyone as to what, in fact, was done. This is the call sheet of a call from Hughes, a message from Hughes to William A. Forrester, of Merrill, Lynch, of October 26, 1960. It starts out with the time 12:30 p.m. (Per Opr) Get him on the line.

"INFO They talked."

Then "2:00 p.m."—and this is this message from Hughes to Forrester, "Call him back and tell him that

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for his information that Charlie Thomas"—[24738] parenthetically the then president of TWA—"negotiated and developed the deal with Dillon Read financing plan without my authority or encouragement from me; he forced it down my throat then at a Board meeting at which time he created a coalition of my directors and turned them against me and faced me with a mass resignation of all but one of the TWA directors. I have never liked this plan; I have never been in favor of this plan; I have fought it from the very beginning and I am still fighting it and I assure you that if it is employed it will be over my dead body and if you would like to come up with any suggestions of any alternative plan or any way whatsoever by which I can avoid being forced into the Dillon Read program, I would be most grateful. It is very flattering for you to say that you don't think I have ever been forced to do anything and maybe there was a time when this might have been fairly accurate statement, but I assure you it is not true today and has not been true concerning this Dillon Read program from its inception. I have fought it hammer and tong from the very first day that I ever heard of it."

Why? What the Hughes deposition is going to establish, and I have no doubt about it, and it will be established in the first week of deposition beyond any [24739] doubt, that the motivation for what Hughes did as charged in this complaint was a financial one and it consisted of tax avoidance, a specific financial motivation. That is what cast light on what was done and why it was done and how it was done and what led him into the antitrust violations which he and the others clearly committed.

In terms of the motivation, on December 4, 1960, Mr. Hughes apparently had a telephone conversation with Mr.

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Carver, of the Bank of America. These are Mr. Carver's notes of that conversation. And at page 3 of those notes in setting out at length a conversation with Mr. Hughes that ran about an hour and a half on the phone. At the end of that Mr. Carver says:

"Three things came to HRH's attention this week anti DR."

What follows makes it clear this is anti the Dillon Read financing plan.

"1. 102 tax situation—it is real bad and three weeks before year end—ML——"

That is a reference to Merrill, Lynch and a proposed alternate financing plan——

"ML is better—have chairman of board and only [24740] need to get one man (Nixon?) so he would have to set out at once to refinance."

Now, there is the proof of why. It was the 102 tax situation. And I think the first week of the examination of Hughes based on things like this plus his tax returns, which your Honor directed that we have, and plus some other documents, are going to supply that background against which the purposes of the acts done will be obtained and will explain why they did get into antitrust violations.

Now, I know of no other way to get that information the way Hughes ran his empire, characterized by secrecy, by being surreptitious, by leaving behind no trails, by instructing people to keep things secret and giving them only part of the information, by sitting in the center of the web and pulling all the strings. He is the one there. I have said and I repeat to your Honor, I believe that 75 per cent of the evidence we will introduce at the trial will come out of the mouth of Hughes during his deposition. Thank you, your Honor.

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The Court: The next matter for argument is the question of the attorney-client privilege. Mr. Davis.

Mr. Davis: On the attorney-client privilege I [24741] ask Mrs. Lea to present the matter to your Honor, if she may.

The Court: Certainly.

Mrs. Lea: May it please the Court, I should in the first instance like to point out that the documents that we are talking about and the question that was raised before the Special Master which is on here before your Honor involve communications which are unquestionably communications between attorney and client and to which the privilege unquestionably would apply were it not for the matter of waiver.

The Court: I understand that the documents we are talking about on this appeal have already been reviewed by the Special Master.

Mrs. Lea: That is correct. He has seen the documents. He has stated on the record that these are communications between attorney and client, and if it were not for the question of waiver, they certainly would not be producible.

Toolco, of course, does not take issue with the general statement that if a waiver of the attorney-client privilege has occurred documents are producible. The question and the primary question before your Honor, is whether or not a waiver of the privilege has, in fact, [24742] occurred.

It seems to me that in order to put this question of waiver in proper perspective it is necessary to see what it is the privilege is designed to accomplish. The privilege is designed to protect the confidentiality, it is designed, in a measure, to protect secrecy, an unpleasant word here insofar as discussions between client and attorney are con-

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cerned, it is designed to operate to keep from the public generally, often persons not directly involved, that which is passed between attorney and client. Accordingly, it is in our view only when the client does something to destroy the secrecy or to indicate that the policy or privilege no longer obtains that we can say the waiver has, in fact, taken place. This is accomplished, if at all, through a disclosure of the contents of the communication, the nature or contents of the communication. It is that which will indicate if the client no longer wishes to keep the material confidential.

Now, if it is a disclosure which is, in fact, required before we can say the waiver has taken place, it is plain to us, at any rate, that in either paragraph 4 of the answer of Toolco nor in any of the affidavits—specific reference was made to the Holliday [24743] affidavit—that neither of those documents did, in fact, disclose what the nature or the contents of the advice that was given by counsel to client is, nor is there any disclosure of any of the facts or any portion of the communications which passed between the attorney and the client.

Under these circumstances, without any kind of disclosure at all there has not been any waiver. If there be no waiver, there is no compulsion for Toolco to produce these documents.

We do understand that having pleaded advice of counsel, Toolco cannot forever claim that privilege and claim that it need not disclose the basis of that defense, assuming that defense is pressed at the trial, and assuming that Toolco at some point seeks to rely on it. If at the appropriate time it appears that reliance will be placed on that defense and if it appears that information which is now privileged is necessary in order to establish that defense or is necessary to

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the opposing parties in order to be able to meet it, then at such time it will become appropriate to make a choice of furnishing that information to the adverse parties, thereby waiving its privilege and giving it up, or waiving and giving up its defense. The choice, however, is [24744] Toolco's to make, whether to keep the defense or keep the privilege, and it can be required to do so, we believe, that is, to make a choice, only at a time when Toolco is called upon to divulge the factual basis of its contentions and its defenses. We have certainly not come to this point as yet.

The plaintiff has not even supplied to Toolco what it claims or what the basis of its motion is. We feel very strongly that the papers before this Special Master are privileged, that there has been no disclosure, no waiver of the privilege, and that opposing parties are accordingly not entitled to any of this information.

However, primarily in an effort to see to it that nobody who claims a need for relevant facts is deprived of the relevant facts, on September 17th Mr. Davis made an offer on the record to opposing counsel in which he said that he would turn over and the Special Master hold all materials which we claim pertinent which the Special Master can turn over to opposing counsel when plaintiff has revealed the basis of its complaint and the Court has had jurisdiction of the subject matter.

In a memorandum which we submitted today Toolco, it seems to me, has made an even more generous offer.

[24745] It is said that primarily and by reason of the fact that we think it is essential before anything else in this case be done that plaintiff be required to answer interrogatories and tell us what this is all about, and if they claim that this material or the documents with respect

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to which we claim privilege is necessary in order to permit them to answer interrogatories and having got this information, once they are in position to use it, they will then be able to answer interrogatories, then the Tool Company has offered in its papers to make this material under those conditions and circumstances available to the Court. I don't know that we have heard yet from counsel for TWA as to the acceptability of the second proposal. I don't know.

The Court: I am sure Mr. Sonnett will want to answer your argument.

Mr. Sonnett: I am going to yield to a most charming man at this table, Mr. Kaminer.

Mr. Kaminer: I want to apologize, your Honor, on various counts. First, I may be slightly unintelligible because I am getting a cold, and, secondly, for being here at all, because, as your Honor knows, [24746] I am out of the case for other reasons, because of other engagements, but was brought back because of my knowledge of the subject, and, thirdly, for saying to you again that which you have heard before, because I cannot help it if the same arguments are made to you. I think your Honor's patience is something which I really enjoy.

We have submitted to you a brief which we sent to the Special Master in which we set forth the arguments which had been made to you before and made to the Special Master all over again after you had affirmed his first ruling. Now, today at 3 o'clock I get this new brief containing two points, and I quote:

"1. Toolco has not waived any privilege by reason of its pleading or otherwise since the answer merely gives notice that advice of counsel will be asserted as a defense without disclosing the nature or contents of the advice relied upon . . ."

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I now turn to what has been said to your Honor in this courtroom, that no waiver can result from the mere pleading of the defense prior to the disclosure of the privileged information, except in those cases where, unlike here, the pleading itself discloses the advice.

[24747] That was said to you, if your Honor please, before you affirmed the Special Master's ruling.

But let me go on to point 2:

"2. While Toolco may be required during the course of pre-trial proceedings to disclose the facts upon which it relies with respect to any given defense or give up that defense, it may not be required to do so until such time as it is appropriate for Toolco to disclose the factual basis of its defensive contentions."

This has been said to you by my learned opponent the last time:

"The development of further specifications of wilful and malicious interference must await the completion of Toolco's discovery. Until all facts upon which TWA relies are ascertained, the matters with respect to which Toolco asserts its counsel's advice as a defense cannot be determined."

And now we turn to page 14 of their present brief:

"The development of further specifications of wilful and malicious interference must await the completion of Toolco's discovery. Until all facts upon which TWA relies are ascertained, the matters with respect to which Toolco asserts its counsel's [24748] advice cannot be determined."

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How often are we going to say to the Court and to the Special Master that there is no question, that this whole thing is moot. And I am not going to be sweet about this. How often are we going to bring this issue before the Court and have the Court listen to this all over again on the basis of the claim that the answer did not waive anything, that the question is totally moot, particularly, your Honor, after all these affidavits that have been filed, which your Honor has, which the Special Master has analyzed and ruled upon and said of course it is waived, anyway. One of the affidavits says:

"The activities of Toolco subsequent to 1960 which are alleged to have constituted a malicious and wilful interference with TWA's business as well as a violation of the antitrust laws were taken on the advice of counsel to Toolco that such activities were necessary or desirable in order to protect Toolco's equitable rights."

Well, if that is not telling your clients what the advice was and telling the world what it was, I don't know what it is. There is no issue here of any right or question of whether they should waive the privilege—[24749] the privilege is waived. That is the fact. It happened before the answer, it happened again in the answer, it happened again after that.

Now, let me tell you one other point, and I think your Honor will feel perhaps sympathetic with me for being mad and no longer sweet. In April the Special Master ruled that they furnish a list of all the documents which they wished to withhold. Do you remember the April-May letters were with you on your last ruling—

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The Court: May 2nd and May 3rd.

Mr. Kaminer: May 2nd or May 3rd. I want to quote from your last ruling in which you said that not only does it seem that the Special Master had written an interesting dissertation of the law, but the Court sustained the ruling of the Special Master as he has applied the law to the questions presented to him. This was no academic exercise and these May letters were before you and there was a direction that a list of all the documents be furnished. We have not got such a list today.

The Court: I understood from reading the transcript before the Special Master that the purpose of furnishing the list was to provide a background for [24750] argument on the motion. But since the documents were referred to the Special Master and he has now ruled that the privilege has been waived there is no need for giving you the list. You get the documents, according to the Special Master's ruling.

Mr. Kaminer: I don't think that is quite right.

The Court: I have read the whole file before you came to court.

Mr. Kaminer: The Master had made a ruling earlier, as you know, not only as to the waiver point, but as to various other points.

The Court: But the purpose of the list was merely to facilitate argument before the Special Master in the application.

Mr. Kaminer: With all due deference, I thought the list was to be given to us to see what documents were withheld, because I do not believe that all the documents which are withheld, none of them were produced.

The Court: Well, the Special Master has ruled you are entitled to all the documents; so what do you need a list for. He is not withholding any.

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Mr. Kaminer: We are entitled to all the documents from a certain date on. There were [24751] more documents withheld prior to that date.

The Court: I understood that all the documents in issue were submitted to the Special Master, that the Special Master saw them, that you did not see them, and that appears from a reading of the transcript.

Mr. Kaminer: The Special Master has recently again when he made the second ruling, your Honor, he told us again.

The Court: As I understand it, all documents were submitted to the Special Master and Mr. Davis, I think, so indicated. Page 122 of the transcript of the September 15 hearing before the Special Master. Counsel for the Hughes Tool Company said he made available to the Special Master all the documents in issue.

Mr. Davis: That was done, your Honor.

The Court: And the Special Master ruled upon those documents when he handed down his ruling. So that the purpose of the list was in case there was a dispute at the hearing you could direct your attention to them. Mr. Davis didn't furnish a list because it is immaterial at this point, since the Special Master as it stands right now has ruled that you are entitled to all of them.

Mr. Kaminer: So that you don't misunderstand [24752] my point, at page 164 following this discussion the Special Master again ruled that there should be a list furnished.

The Court: I read that.

Mr. Kaminer: I think we need this list for our protection. The record is now very confused. Let us have a clear list of what is withheld. That is what the Master ordered and that is before you now. That is the ruling on page 164.

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The Court: I have a notation of it. Go ahead.

Mr. Kaminer: In any event, what you have been told in this brief is the very thing you have already decided last time. And I think we have reached the point here where there must be an end to this kind of multiplicity of proceedings, where people obey what is ordered to be done. Thank you.

Mr. Barr: My name is Thomas D. Barr. I am one of the attorneys together with Judge Bromley who represent the Equitable and the Metropolitan, and I together with Mrs. Lea and Mr. Kaminer have been on this part of the case, and being somewhat younger than Mr. Kaminer I am not unhappy at the opportunity to argue as he was.

I was prepared to take your Honor at great [24753] length through all of the affidavits that I attached to my affidavit which your Honor has before you and which your Honor, I notice, has seen on several occasions in the past. I am not going to do that. I want simply to say, your Honor, that it is perfectly clear to me the Tool Company has waived the attorney-client privilege with respect to every issue in the complaint and in the counterclaims. That it has done intentionally and deliberately.

You have before you attached to my affidavit the affidavit of Raymond A. Cook, dated November 22, 1961, and filed in the Toolco-Northeast Control case before the C. A. B. That affidavit describes activities of Toolco since 1944. That affidavit, your Honor, I believe is the first draft of the counterclaims. If you read that affidavit next to the paragraphs in the counterclaims you will see that word for word in many respects many paragraphs are the same. The Special Master so found. The Special Master's first ruling at page 4372 of the transcript said just that. That analysis is

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not original with me. It was Mr. Rankin's. It is perfectly clear that that is exactly what it is.

In addition to that affidavit, there are two affidavits of Mr. Holliday, one in this case, one in the [24754] C. A. B. Toolco-Northeast Control case. One of them adopts Mr. Cook's affidavit in toto. Both of them set forth in great detail not only the fact that the advice of the lawyer was relied on, but exactly what acts were taken and what was done and what was said with respect to that advice. It is perfectly clear.

Finally, your Honor, Mr. Davis' own affidavit in this case, which is attached to my affidavit as Exhibit C, says on page 4:

"The activities of Toolco subsequent to 1960 which are alleged to have constituted a malicious and wilful interference with TWA's business were taken on my advice as counsel."

And then for a number of pages thereafter he sets forth what the Tool Company did, what actions he took, and so on.

These men are all attorneys, your Honor. That is perfectly clear. But they are also the attorneys who throughout this whole period of time were doing the basic negotiating on behalf of the Tool Company with all of the other clients. Mr. Cooke and Mr. Bautzer largely negotiated the 1960 financing. Mr. Davis was intermittently involved in the activities of 1961. The Master's last ruling, the one of September [24755] 15, 1962, closes with this:

". . . I believe regardless of any pleading there have been numerous waivers by affidavit in which

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the whole question of the legal advice over a long term of years to the Tool Company has been presented in support of claims in legal proceedings, and by all of that action I consider that there has been a waiver. . ."

I won't burden your Honor any further. The hour is late. You have read all this material. I am not opposed to having the same opportunity to argue the same question, but I hope the facts are a little different next time and in different form.

The Court: That completes the argument on the matters before the Court. The Court is prepared to rule on the six items and will submit a formal pre-trial order and file it by 10 o'clock Friday morning. The hour is late now and I am in the middle of a three-month criminal trial. So tomorrow's time is pretty well circumscribed.

In Item 1, which was the ruling of the Special Master adjourning the deposition of Howard R. Hughes to February 11th, Mr. Sonnett's application to withdraw the appeal from that ruling is granted. Item No. 2, [24756] which is the appeal by Hughes Tool Company to review the order of the Special Master denying its application to examine Ben-Fleming Sessel and the Irving Trust Company by Sessel and Arthur L. Wadsworth and Dillon, Read & Company by Arthur L. Wadsworth, that appeal is denied and the order of the Special Master is affirmed. In conjunction with that I would like to say that in view of the withdrawal of the appeal by TWA from the order of the Special Master fixing the appearance of Mr. Hughes on February 11 I will take this time as an opportunity to state that I agree with what the Special Master has said and

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that this deposition will proceed on February 11 in Los Angeles at the same time and place fixed in the original subpoena.

Item No. 3, the application by Hughes Tool Company pursuant to Rule 16, that application is denied without prejudice to renew on the papers before the Court 30 days after the completion of the deposition of Howard R. Hughes.

As to Item No. 4, which is the appeal by the Hughes Tool Company from the order of the Special Master directing the Tool Company to produce for inspection and copying by opposing counsel the documents with respect to which the Hughes Tool Company claims [24757] attorney-client privilege, the order of the Special Master is affirmed.

As to Items Nos. 5 and 6, which are related appeals, the first one going to the order of the Special Master denying TWA's application to quash or strike interrogatories served by Toolco on October 11, 1962, and the second, which is an appeal from the order of the Special Master overruling TWA's objections to further interrogatories dated November 13, the order of the Special Master is modified to the extent that TWA shall answer those interrogatories 60 days after the completion of the deposition of Mr. Hughes.

I think the resolution of much of this matter, both as to Rule 16 and as to the adequate answering of interrogatories by the plaintiff and the motions which Mr. Davis has been talking about, all will be assisted greatly by the deposition of Mr. Hughes, and I think, Mr. Davis, you will be closer to the resolution of the questions you are raising after Mr. Hughes' deposition than you are now.

Transcript of Proceedings, January 14, 1963

[4884]

[CAPTION]

BEFORE:

HON. J. LEE RANKIN,
Special Master

[4885]

Hearing on request for production of Toolco's privileged documents, at the offices of Chester C. Davis, Esq., 120 Broadway, New York 5, N. Y., on January 14, 1963, at 11:56 a.m. Reported by Hyman Schneider, a Shorthand Reporter and Notary Public of the State of New York.

[4886] [APPEARANCES:]

[PRESENT:]

Mr. Hupper: Let the record show that the time is now 11:56 a.m., and that the various counsel are here to accept production of the so-called privileged documents which by Order of Judge Metzner of January 10, 1963, are to be made available to all parties by noon on January 14, 1963.

Let the record show that we are further here to receive delivery of any lists of further documents in respect of which the Tool Company claims the attorney-client privilege, again as provided in paragraph 4 of Judge Metzner's order of January 10, 1963.

*Appendix A, Annexed to Affidavit of Bruce Bromley,
February 15, 1963*

Transcript of Proceedings, January 14, 1963

Mr. Cook, is the Tool Company prepared to com- [4887]
ply with the Order of Judge Metzner of January 10, 1963?

Mr. Cook: Mr. Reporter, please show on the record that Mr. Chester Davis is not present at this time, when the request is being made. I have been shown by his secretary, however, a copy of a letter dated January 14th, from him to Judge Metzner, in which Mr. Davis has made the statement, "The documents have been placed in a sealed envelope and are now in my possession subject to further direction by the Court."

I have also been handed by Mr. Davis' secretary a sealed Manila folder which I suppose is an envelope, and it carries this legend on the face. "January 14, 1963. These are the privileged documents which are producible pursuant to the Special Master's order of September 15, 1962, and the order of the Court dated January 10, 1963, not to be opened except upon further instructions from Mr. Davis."

Construing the two together I do not consider, gentlemen, that I am privileged to turn over these documents to you at this time.

Mr. Hupper: Mr. Cook, can you tell us whether or not Judge Metzner has stayed the effectiveness of [4888] his order of January 10th?

Mr. Cook: I have stated all I know about it, Mr. Hupper.

Mr. Hupper: We understand from all information available to us that there is no such stay outstanding, and that being the case, I again call upon you to produce those documents.

Mr. Cook: I have stated all I know on the record.

Mr. Hupper: I must put you on notice that your failure to produce those documents at this time is in our view, it now being 12 noon exact, a violation of Judge Metzner's

*Appendix A, Annexed to Affidavit of Bruce Bromley,
February 15, 1963*

Transcript of Proceedings, January 14, 1963

order of January 10, 1963, and we will so treat it in further proceedings before Judge Metzner.

Mr. Giddings: The record should show that Mr. Hupper in his remarks has been speaking for all of the additional defendants, and Mr. Furth advises me also for counsel for TWA.

Mr. Bradner: That is correct.

Mr. Hupper: Mr. Cook, I would also like to request of you whether or not there are any other documents other than those which have previously been supplied to the Special Master, as to which a claim [4889] of privilege has been made, in respect of which the Tool Company now claims an attorney-client privilege?

Mr. Cook: I would prefer for Mr. Davis to answer that Mr. Hupper.

Mr. Hupper: The reason I asked that question is that paragraph 4 of the order of the Court of January 10th requires that the Tool Company provide us at 12 noon on this date with a list of any such other documents. In the absence of any information concerning such documents, or the furnishing of a list, it must be our position that there has been a violation of Judge Metzner's order in that respect also.

Gentlemen, I have nothing further except in accordance with your suggestion, Mr. Furth, I think we ought to request the reporter to prepare this transcript immediately so it can be sent forthwith to Judge Metzner.

Mr. Cook: Is that all?

Mr. Hupper: That is all for the moment.

(Whereupon, the hearing was concluded at 12:04 p. m.)

Toolco's Notice of Motion, January 14, 1963

[Doc. 145]

[CAPTION]

61 Civ. 2324

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Chester C. Davis, sworn to this 14th day of January, 1963, and upon all the proceedings heretofore had herein, the undersigned will move before Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, at a time and place to be fixed by him (a) for an order, pursuant to Rule 30(b), Federal Rules of Civil Procedure, that the deposition of Howard R. Hughes may be taken at this time only on written interrogatories; (b) in the alternative, and if the relief requested under Rule 30 (b) is denied then, pursuant to the order of the Court of September 7, 1961, that the motion of Hughes Tool Company to dismiss the complaint pursuant to Rules 12(b) and 56(b), Federal Rules of Civil Procedure, be brought on for hearing and determination and in connection therewith that the Court set a schedule for argument and for the submission of papers in support of and in opposition to said motion; (c) that the order of the Court of January 10, 1963 be stayed or otherwise modified until a final determination that this Court has jurisdiction over the subject

Toolco's Notice of Motion, January 14, 1963

matter of the complaint; and (d) for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.

January 14, 1963.

Yours, etc.,

CHESTER C. DAVIS, Esq.
Attorney for Defendant
Hughes Tool Company
Office & P. O. Address
120 Broadway
New York 5, N. Y.

[To All Attorneys of Record]

[24759]

Pretrial Hearing, January 17, 1963

[CAPTION]

BEFORE:

HON. CHARLES M. METZNER,
District Judge

* * *

[APPEARANCES:]

* * *

[24761] The Court: Gentlemen, I have just received and have not had an opportunity to look at some minutes before the Special Master. Are they necessary for me to have read before we have our hearing this afternoon?

Mr. Davis: They do involve some new matter, your Honor, but I think we could take care of it with statements.

It primarily relates to the efforts made by some of the parties to obtain further documents or matters on the requested deposition of Mr. Hughes, and that sort of thing is covered in there.

The Court: All right.

Mr. Sonnett: I think Pages 90 and 91, your Honor, of the transcript are the matters in particular that the Special Master suggested be raised with your Honor relating to—I just received ours, yours must be at your office.

Mr. Davis: We have not received them yet.

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Mr. Sonnett: I would be happy to read them aloud, if you like, it is a half a page, if you don't have your copy of it.

Is that agreeable, your Honor?

The Court: Certainly.

Mr. Sonnett: Reading from Page 90, this re- [24762] lates to the question of where the Hughes deposition should occur and the length of time during which Mr. Davis and Mr. Hughes should consider that question, having in mind your Honor's suggestions at the pre-trial conference in chambers yesterday, the Special Master stated today at Page 90 of the transcript:

"The Special Master: When I brought the matter to your attention I had in mind that it might be much more satisfactory and pleasant to Mr. Hughes and everyone else involved if we could have some satisfactory place that would provide not only a room where the deposition could be held, but a place where Mr. Hughes and his counsel could retire to at any time that it became a burden upon him and he wished a recess, or anything of that kind, as well as some adequate room for other counsel to retire to.

"I thought it could be arranged without prejudice to any claims and rights that the parties might have.

"As I see it, it is a matter of accommodation, and I am ready to bring the matter to Judge Metzner's attention and ask him to close the matter as of next Monday at 5 o'clock, and if there isn't some agreement on it, we will just have it at the courthouse, [24763] and that will be the end of it."

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There is another paragraph, I suppose, that should be read, your Honor.

"After we once start, or after it is set, and we all have to make commitments, I don't think it is reasonable this notice to try to move around. I am not willing myself to ask the whole court system to try to set something up for us and do all the things necessary, to inconvenience the Court and the Marshal's office, and other people that will be necessary to help us, and then make a change in it.

"I assume you are not ready to say at this time, Mr. Davis, what you would desire to do, without prejudice."

And Mr. Davis replied: "I have the same confidence that Mr. Barr expressed a moment ago with respect to my outcome of the motion to dismiss."

Meaning that he was not ready to answer the question.

The Court: Yes. Well, I would suggest that regardless of the outcome of Mr. Davis' motion that that decision be made because you may be faced, Mr. Davis, with proceeding on February 11th and obviously arrangements do have to be made in advance as to what [24764] is going to happen so that you could indicate by next Monday where you want this taken in view of the information you brought to the Court's attention yesterday.

However, I have received a letter from you today in which I understand that you have withdrawn from the Court's attention that portion of the affidavit that we discussed yesterday. Am I correct in that?

Mr. Davis: I thought it was the reverse, your Honor. I thought I said that since Paragraph 9 was before your

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Honor yesterday, that I was following the suggestion in effect that Mr. Sonnett made which was to file the affidavit with Paragraph 9 excised, and I am submitting Paragraph 9 in an envelope to be filed with the clerk of the court.

The Court: So that Paragraph 9 and the claims of relief based upon that Paragraph is still before the Court for determination?

Mr. Davis: No, the only thing before the Court for determination, your Honor, under the motion and application that I have made is solely that of bringing on our motion to dismiss.

I had asked for the Court the alternative of acceding to a procedure for furnishing the plaintiff with answers to written interrogatories, if it was the [24765] Court's view that such a procedure was necessary in order to consider the motion, and I understood the Court to have stated that it was not prepared to consider favorably a procedure for written interrogatories.

The Court: Is that the sole basis for Paragraph 9 being in the affidavit?

Mr. Davis: That is correct, your Honor. The purpose of Paragraph 9 in the affidavit, your Honor, is solely for the purpose of indicating the substantial burden and risk upon the Tool Company to proceed in a manner indicated by the order of January 10th before the plaintiff has either been subjected to the testing by motion to dismiss based upon the record as it is as of today or after the plaintiff had been given such other and additional opportunity as your Honor may grant to not come in with respect to advancing additional facts now known to the plaintiff, but before any examination of the defendants.

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The Court: I will consider that the motion is made on the papers submitted to the Court yesterday, but for the purpose of the record, Paragraph 9 has been separately filed and sealed by the Court, the result being that the notice of motion and affidavit, which you filed in chambers today, shall be entered by the [24766] clerk and these papers shall indicate on their face that there is an additional portion of that affidavit under seal, which has been considered by the Court in conjunction with the applications contained in your notice of motion.

Mr. Davis: That is correct, and I understand that procedure is acceptable to the other parties.

Mr. Sonnett: I have no objection, your Honor, but to prevent any inadvertence of direction of your Honor's present direction, may I apply that Pages 5, 6 and 7 of our memorandum served yesterday which relate to this subject matter be sealed and we will submit a fresh copy for the Court file indicating that those pages have been deleted and are sealed, and would ask your Honor to instruct all other counsel who have the memo to so regard it.

The Court: What are the pages?

Mr. Sonnett: 5, 6 and 7. The entire Point 2 of our memorandum served yesterday.

The Court: All right.

Mr. Davis, you may proceed.

Mr. Davis: Your Honor, I understand that today it is primarily for the purpose of having the record indicating your Honor's ruling with respect to the re- [24767] spect to the request that I have made on behalf of Tool Company or a schedule relating to the submission for determination of Tool Company's motion to dismiss and also with respect to the application of Tool Company for a delayed effective

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date of the order of the Court of January 10th requiring a production of privileged documents.

I understand that as a result of the discussion we had——

The Court: You left something out. You left something out. You have three requests for relief in this notice of motion.

Mr. Davis: That is right, your Honor, I disposed of the other one a moment ago. There was a third request for the possibility of furnishing to the plaintiff the answers to written interrogatories under Rule 33, whether they be addressed to Tool Company or to Mr. Hughes or however they want.

Likewise, a voluntary offer to make available to them, notwithstanding our position of privileged documents, all privileged documents at this time, if your Honor concludes that plaintiff should have that additional information before being subjected to my motion to dismiss.

[24768] To put it differently, your Honor: I conceive of the question that is confronting us now is that the plaintiff has claimed and is now claiming that it is entitled to examine the defendant, particularly Mr. Hughes, who is a named defendant, at this time, based upon the record to date and without any further disclosure to the Court than has taken place as of today.

On the basis of the Court's jurisdiction over the subject matter of this action, and we are resisting that effort on the part of the plaintiff. In resisting that effort, we have made two suggestions on which we are about to get a ruling on the record based upon our conference of yesterday.

The Court: Make a fresh record. Yesterday was a pre-trial conference. Today is just a pre-trial.

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Mr. Davis: All right, your Honor, I don't want to burden the Court——

The Court: You want a record, Mr. Davis, and you are entitled to it, so go make it.

Mr. Davis: It is our position, your Honor, that particularly under the decision of the Supreme Court in the Panagra case that came down, this plaintiff, by filing this complaint, has improperly invoked the jurisdiction of this Court.

[24769] I further submit to your Honor that a defendant is entitled to have not only the question of the Court's jurisdiction passed upon by the Court, but is also entitled to an adequate definition of the factual issues or, to put it in other words, the wrongful conduct alleged before the defendant may be required to testify.

The time has come when your Honor had indicated by its Order of January 10th that it was the desire of the Court to permit the plaintiff to examine Mr. Hughes.

Therefore, we are approaching the problem in two fashions: First, I say we are prepared to give additional information to the plaintiff, additional to the information he has now or had at the time he filed the complaint, and I am prepared to voluntarily give him these privileged documents.

Now——

The Court: You mean after the Court ruled?

Mr. Davis: I beg your pardon?

The Court: You are prepared to voluntarily give him the documents after the Court ruled you should give it to them?

Mr. Davis: I meant waiving the objection that we have to a voluntary—I say voluntary—I say without [24770] relying upon the direction of the Court to do it.

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Secondly, we are prepared, if as plaintiff has been claiming and as we understand plaintiff's position, that a Rule 16 procedure would be premature, and that their answers to interrogatories are premature because they need to examine Mr. Hughes. I am questioning the validity of that argument.

If the plaintiff is not able to identify to the Court now the wrongful conduct which they claim is within the scope of the jurisdiction of this Court, I believe that the complaint ought to be dismissed and that is what I want to test.

I understand on that aspect of the matter your Honor has indicated—I don't know whether I should have a ruling on each one of these points first—

The Court: You just make your argument and I will hear the other people and then I will rule.

Mr. Davis: All right.

Leaving aside that offer that I have just indicated, we come to the question of fixing a schedule for the hearing and determination of the motion to dismiss. In that area I call the Court's attention to the fact that that motion in part, only in part, will be based upon admissions on the record to date by the plaintiff [24771] in the court of the oral examination which the defendant was permitted to conduct under the prior Orders of the Court.

I want to call the Court's attention to the fact that the examination of Mr. Cocke is not completed by reason of the direction of the Special Master under circumstances which, if your Honor wishes to go into, we have been requested by the Special Master to discuss with your Honor—

The Court: I have read the transcript of the hearing involving that point.

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Mr. Davis: Today the Special Master indicated that by reason of certain questions personal to Mr. Cocke, he will be prepared to dispose and permit me to conclude whatever scope of further examination he directs me to conduct at some future time and, as I understand the position of the plaintiff and the additional defendants, they are not concerned about eliciting any additional information from Mr. Cocke.

The second thing I want to call to your Honor's attention, however, is that Mr. Leslie's deposition has not been completed.

And that today Mr. Sonnett marked for identification a document, parts of which he read to your [24772] Honor in the last argument that we had, which resulted in the January 10th Order, for the purpose of requesting Mr. Leslie to translate these written notes and obviously indicating that he would expect to use that material in opposing my motion to dismiss.

He also stated, or confirmed, on the record today what previously appears on the record, that TWA had substantial cross-examination of Mr. Leslie.

Mr. Leslie, up until very recently, was a senior vice-president and financial treasurer of TWA, familiar with the financing aspect of this transaction involved in the acquisition of aircraft that this complaint talked about.

In that regard, your Honor, the position of the Tool Company is simply this: That the plaintiff be denied his cake and eat it too. Either they want to stand on the proposition that they are entitled to examine the defendant, Mr. Hughes, now based upon the showing they have made to date, or it is their position that they want an opportunity to develop more facts before they take the position they are entitled to examine Mr. Hughes.

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As far as I am concerned, they can have either position. I respectfully submit they should not have both.

[24773] In other words, I am prepared to submit for determination by the Court, pursuant to whatever schedule the Court fixes, that my contention that this plaintiff, based upon this complaint and particularly the decision of the Supreme Court of the United States, is not entitled to stay in this court and to pursue the defendants in this way whatever or, I am prepared to consent to any schedule your Honor may fix which would give an opportunity to the plaintiff to develop or adduce any more facts out of TWA.

It is my position that it is the plaintiff's responsibility to establish facts justifying invoking the jurisdiction of the Court. They can not invoke the jurisdiction of this Court based upon what they do not know, but expect to find out from Mr. Hughes.

Obviously if they have got some other documents which they think are relevant or pertinent that they want to use in opposition to the motion, I would just expect an adequate development of whatever the facts are in connection with whatever document it is, according to the direction of the Special Master.

I don't want my position in this regard to be construed as it is likely to be construed as another attempt to delay anything.

[24774] With the Supreme Court decisions of the other day I am satisfied that I can proceed and should proceed with the protection of the rights of my client, especially the heavy burden of expense that this litigation is causing. I do recognize, in fairness to that, the plaintiff may assert and may assert later, and that is why I want to preclude it if I can, the assertion that, oh, well, there was a lot more

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that Mr. Leslie knew, but we didn't have an opportunity to complete Mr. Leslie.

I will make one more comment with respect to the schedule, your Honor, because I have in mind what was discussed informally yesterday with all of the counsel.

In connection with the fixing of this proposed schedule, I appreciate the fact that plaintiff is pressing your Honor for a schedule which would permit the possibility at least of a determination of this motion prior to February 11, as if that date is any more sacrosanct than any other pre-trial Order as to the deposition of other witnesses, but I am fully aware——

The Court: I should not use the word "sacrosanct" in that Order, should I?

Mr. Davis: But I am fully aware of the strong expressions made by your Honor in that regard. What I want to call to your Honor's attention, which I did not [24775] do yesterday, your Honor, is that among the other burdens which I already have and may concur momentarily, I am confronted with a briefing schedule in the Delaware action, which also involves a motion to dismiss with respect to Mr. Hughes. That schedule involving a brief this coming Wednesday and oral argument this coming Friday. That is an action which, of course, is being guided and controlled by Mr. Sonnett of Cahill's firm, I should say, on behalf of TWA.

I have no doubt that I can obtain an adjournment or an extension of the schedule in Delaware if I had a little cooperation from counsel here, and I would like to suggest that the Court could be of some assistance to me in obtaining that cooperation if your Honor has in mind the kind of a schedule which was discussed yesterday.

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Now then, I come to the last application for relief, which is contained in the papers that were filed last Monday, and that is in connection with the Order of the Court affirming the decision of the Special Master with respect to the delivery of these privileged documents.

In that connection I merely want to point out that the delivery of those documents results in irreparable [24776] consequences, not merely with respect to the documents themselves, but with respect to the subject matter opened up by those documents.

I want to be sure that your Honor understands that the issue here is not whether or not these documents are in fact communication between attorney and client entitled to the attorney-client privilege, but for a waiver, that the issue of law that has been decided by the Special Master, and affirmed by your Honor, is as to the effect of a waiver by a mere pleading of a defense advice of counsel without an identification of the nature of the advice.

The Court: What about the affidavit?

Mr. Davis: Likewise the affidavits which state that what was done was done pursuant to advice to counsel, but does not disclose the nature of the advice. The presumption is that what was done was done because that is what counsel advised, but conceivably they did exactly the opposite of what counsel advised.

There is a statement by the Special Master of other conduct, but there has been no determination of what other conduct is being referred to.

I do recognize that—bear in mind, your Honor, that this is a defense which is asserted before the [24777] defendant knows what the plaintiff is claiming, he knows now a little bit more in this wilful prosecution, we do realize that so long as that defense remains the plaintiff is entitled to inquire into it, but I submit and that is the whole issue on

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which I so far have had adverse rulings of the Court that the time within which the defendant has either to abandon the defense or disclose the nature of the advice, is when it is his turn to be deposed, to testify in pre-trial proceeding of some kind.

That is the issue of law which I would like to preserve, if I may, for some Appellate review or, at least, until such time as the Court has had an opportunity to pass upon this jurisdiction question and, therefore, the relief which I am not seeking with respect to this production of documents is that the Court consider delaying the effective date of the production of those so-called privileged documents at least until the Court has acted upon this motion to dismiss, which is about to be scheduled.

Now, alternatively, so that I won't have to stand up again, I have indicated yesterday that should, contrary to my expectations, the Court not look with favor upon that delayed date, that then I would like a [24778] reasonable opportunity to try to get some additional relief if additional relief is, in fact, available to me.

Now let me address myself for the moment as to what harm we are talking about by delaying their obtaining these documents, these privileged documents.

Is it for the purpose of opposing my motion to dismiss? Presumably they know what the course of conduct is which they claim, I don't know what they have to prove in a motion to dismiss, but can't they identify what it is they are claiming without these communications between attorney and client?

Presumably it is for the purpose of preparing for the examination of Mr. Hughes. This presupposes, of course, that the motion to dismiss is not granted. They say that is

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what we assume and we are entitled and getting ready for that eventuality.

Everything that has been said on the record, your Honor, indicates that the examination of Mr. Hughes is to be protracted. Sonnett made that statement on the record, several months. These additional defendants want to examine on the counterclaim even though they haven't filed an answer yet to the counterclaims because they got extension of time from the Special Master, as [24779] I recall it, that so long as the motion is to dismiss the counterclaim, which they did not make, but TWA made, was pending, they did not want to have to answer the counterclaims.

They want to examine Mr. Hughes on February 11th. We have no answer to the counterclaims yet.

Now, I submit, your Honor, that considering the possible injury to Tool Company, if we should be right, either with respect to our motion to dismiss or on this question of law, as compared to the injury which is likely to take place or the handicap to these plaintiffs and additional defendants in examining because they are not able to obtain what normally no one obtains, namely, privileged communications between attorney and client, leaving aside whether or not I made a mistake in my pleading, is hardly to me a reason for saying that it is of importance that they obtain the documents now.

Therefore, I respectfully submit that on that issue the Special Master has seen all these documents and I would have no objection for the Court inquiring of the Special Master as to whether he believes that these documents would contain anything which would be of material bearing on any motion to dismiss, but I do resist the production of those privileged documents [24780] at this time because of the consequences to my client if that takes place.

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The Court: I understand that you are still relying upon your defense of advice of counsel.

Mr. Davis: No, your Honor, as a matter of fact—

The Court: It is not in the case any more?

Mr. Davis: Your Honor, certainly if it is based—if all they are claiming, the defense of counsel was a defense, if a defense at all, to the alleged wilful and malicious interference of the affairs of TWA.

Tillinghast identified the documents, letters—the letters that he received. If that is all that is involved in this wilful and malicious interference, I don't need that defense, but there again I am caught between several things which have happened. I have been taking the position all along that a defendant had to make a final decision with respect to his defenses only after either a Rule 16 proceeding or answers to interrogatories. But on January 10th I was told I was not going to have that.

Therefore, the question about when need I amend my pleadings, well, presumably, if the deposition of the Tool Company takes place on February 11th, as [24781] presently scheduled, then I have got official date at that point on the basis that I am assuming, but I submit that the issue that the assertion of advice of counsel puts the other side merely on notice that that is a defense which will be asserted at the trial, and that they are entitled to discover that evidence before we go to trial, but it itself does not constitute a waiver of the privilege.

That has been the difference of opinion.

The Court: Plus the affidavits, don't forget the affidavits.

Mr. Davis: Likewise it does not identify, disclose or the nature of the advice. I think that that decision, your

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Honor, if it is the law, I presume it is as of the moment, I submit has some pretty serious impact on the proof as a whole, and I believe one which does deserve review to the extent to which a review is feasible, without adversely affecting whatever rights the plaintiffs may have.

My point in this regard simply is that I don't believe that there is any facts which would justify the conclusion that there is any particular harm or injury to the plaintiff at this time.

Now, if we presuppose the motion to dismiss [24782] that that is subject—a certification or otherwise, depending which way it goes, by whatever decision comes down, is likely to be reviewed, there would be an appropriate time to obtain a review of the whole at that time. I respectfully submit that until the Court has made a determination that it does have jurisdiction based upon this complaint and whatever has transpired to date, but not about what is to transpire tomorrow, and that the enforcement of the determination that plaintiff is entitled to these documents on the ground of the waiver of attorney-client privilege is something which should be submitted.

The Court: You have not only moved under Rule 12-B, but also under 56, for summary judgment and there will be affidavits submitted and I don't know whether those alleged privileged documents or, rather, I will go along with you and say that the non-waived privileged documents would not be necessary for the plaintiff to resist your motion.

Mr. Davis: Your Honor —

The Court: I am sorry, I thought you were finished.

Mr. Davis: I was going to address myself to Rule 56.

[24783] The Court: I was just making an observation.

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Mr. Davis: Your Honor, the motion was drawn, of course, before the Supreme Court came down with this Panagra decision. I think you will find that the grounds upon which we present this is not based upon any question of the triable issue of fact. It is true the plaintiff does want to submit some affidavit in that regard and I would be interested in knowing what facts they want to disclose.

The Court: Are you going to rely solely on the face of the complaint to make your motion?

Mr. Davis: Yes, sir, I have two grounds on which I am going to brief, at least it is my thinking as of the moment. One is going to be based solely upon the complaint, the decision of the United States Supreme Court in the Panagra case, and the CAB orders, 44, 50, and the further control case which specifically covered the conduct in relationship of Tool Company with TWA.

The second part of my contention will be predicated solely upon admissions of the plaintiff. I submit, your Honor, that admissions of a plaintiff are not in the same category as when parties submit conflicting affidavits which raise an issue of fact to be filed.

If a plaintiff makes admissions and says this [24784] is what I am complaining about, it becomes part of the complaint and if what he is complaining about does not entitle him to any relief, that is the end of it.

The Court: You mean to say—I don't know what the record shows—but I assume you are referring to the record of depositions that exist up to the present time when you speak about admissions, is that correct?

Mr. Davis: Those contain admissions and not admissions, your Honor —

The Court: You are going to put those in and Mr. Sonnett is not going to be able to say there are other por-

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tions of that record which I want to come in which may dilute the admissions.

Mr. Davis: Certainly, my point is, Your Honor, that admissions, I was addressing myself to the —

The Court: Weight to be given to the document.

Mr. Davis: No, to the problem and the cases and the line of cases which relate to whether there is a triable issue of fact whether two parties contend something different.

Now, we may disagree and Your Honor will have to decide what is the nature and scope of the admission, but it is not the same thing as whether I claim that fact "A" two place and the other side claims fact "B" [24785] two places, thereby raising an issue of fact to be decided which as the Second Circuit has said, you don't decide that on summary judgment. That is the only point I was trying to make, your Honor.

The Court: All right.

Mr. Sonnett.

Mr. Sonnett: Your Honor, I will rest primarily on the memorandum which was served and filed by TWA yesterday. I would add to that only very briefly as follows: In response to the answers Mr. Davis has just made to you and since we have a complaint unanswered here, I take it that Mr. Davis' proposed motions are going to be motions for judgment on the pleadings under Rule 12-C and perhaps a summary judgment motion.

12-C, as the Court will recall, provides that after the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings if on a motion for judgment on the pleadings matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment, and disposed of as provided in Rule 56, and all

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parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

[24786] As your Honor pointed out repeatedly in the case before, therefore a plaintiff is entitled to discovery by way of deposition and certainly the plaintiff is entitled to present portions of the existing record, affidavits or anything which can confirm that which is going to be presented to the Court by Mr. Davis, which I haven't yet seen.

Accordingly, your Honor, I think the record made today on this problem is so clear that I would feel that I were trespassing on the Court's time, it being now about a quarter to 6:00——

The Court: Only a half a day, Mr. Sonnett.

Mr. Sonnett: It may be for your Honor, but after listening to Dr. Davis all morning, it seems to me like it is several days.

The Court: I have two questions to ask you.

Mr. Sonnett: Yes, your Honor.

The Court: About what is this Leslie deposition. Mr. Davis seems to indicate that one of the basis of opposition to his motion will be a claim by you that you have not completed or started a cross-examination of Mr. Leslie?

Mr. Sonnett: No, sir. Mr. Davis——

The Court: I think I have voiced Mr. Davis' objection.

[24787] Mr. Sonnett: You have, I was disagreeing not with your rendition of what he said, but Mr. Davis would let me better to speak for myself. Your Honor directed that all depositions pending at the time of February 11th would be suspended for the Hughes deposition to commence.

I intend to comply with the Court's orders, of course.

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As for Leslie, again Mr. Davis is making a mountain out of a mole hill. The fact of the matter is, as I presented to the Court the last time we had an argument in court, the fact of the matter is that Mr. Davis has crept up very slowly on Mr. Leslie and he hasn't got into the years which will be most enlightening because these were the years in which the big damage occurred to TWA.

If he sees fit to present a motion to the Court based on whatever there may be in the 10,000 pages of record to date, or the one million, seven hundred thousand pieces of paper to date, obviously I will search that record and present whatever I can to oppose it and anything else available to me to oppose that motion.

As to Leslie, Mr. Davis has not completed his direct and at the rate he is going, he won't be through [24788] with that for a while, so the opportunity for cross-examination hasn't arisen yet.

However, because of a purely practical problem, since he applied this morning in a motion to the Special Master, which is in the record that your Honor hasn't had a chance to read, he applied to suspend all depositions until your Honor had determined his motion to dismiss and in connection with that motion, the Master has directed that the Cocke deposition be adjourned without date, the date to be fixed some time after the conclusion of the Hughes deposition, and in response to Mr. Davis' request that the Leslie deposition be adjourned, I said I had no objection but there was a practical problem.

The practical problem was that we had a piece of paper written by Mr. Leslie, a lengthy one, whose handwriting is illegible or almost so, except to him, and therefore urged that in lieu of taking Mr. Leslie's deposition next week, which was set to be resumed next week and since Mr. Davis

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was asking that it be suspended, that the Special Master should, if he saw fit to do so, send the handwritten notes to Mr. Leslie and ask him to dictate a translation and send them back to us, since the content of that document would be of considerable use not only on the motion, but also on the deposition [24789] of Mr. Hughes, and the Special Master saw fit to so decide and has undertaken to do that so that there isn't any problem in respect of the Leslie situation.

The Court: The next question I want to ask you, Mr. Sonnett: Mr. Davis said he had some problems regarding time because of a Delaware proceeding. Is it within your power to "get off his back" concerning the Delaware proceeding?

Mr. Sonnett: The difficulty there which involves, of course, entirely different offenses and different damages is—

The Court: I am just thinking about time. You know the date that I preliminarily set yesterday.

Mr. Sonnett: Yes, your Honor. May I say to your Honor this that it has been as difficult to get Mr. Hughes to come in to that court as it has been in this and that dilatory tactics followed by Mr. Hughes finally led—after an appeal—finally led to a holding that he couldn't attack the sufficiency of the complaint against him individually there without making a general appearance.

Finally that was settled on appeal and, by the way, all TWA's way, I might add, and finally Mr. Davis brought on his motion. He has been talking about this [24790] Delaware case where, by the way, they are represented by very competent counsel, Judge Tunnel, a former member of the bench down there and a very able advocate, easily as good as what we see in any courtroom.

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Judge Tunnel has argued a good many matters before. I haven't found it necessary to argue down there except once on a preliminary matter about a year ago. He has been talking about a motion to dismiss the complaint against Hughes individually in Delaware for a long, long time, back since May, at least, of this year.

He has made his motion. He has submitted his brief. We have put in our answering brief. It has been served and filed. The vice-chancellor has set the matter down for argument, I do not intend to argue it and I don't see what his problem is.

Mr. Davis creates these very problems for this very purpose. That is to say, that only he can attend everything that may be involved in the Hughes situation no matter where it is and then urges that upon the Courts as an excuse for delay.

If your Honor, despite what I have just said, were to say to me that you think that the administration of justice would be furthered if we were to consent to an adjournment, I would say to your Honor, we would ask [24791] the vice-chancellor to do so cheerfully, because we will follow any suggestion your Honor makes.

The Court: Well, I can't direct you as to what you should do.

Mr. Sonnett: I only want a suggestion if your Honor feels your Honor should make it.

The Court: Well, I think that it would be helpful in view of the tremendous burdens that Mr. Davis says that he is involved in and I am not going down the collateral road to find out whether those burdens are as heavy as he said they are or not, but in view of the position that you have taken in the proceedings in this court, I would say

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that if it was possible for you to relax the schedule that is imposed upon Mr. Davis in Delaware, that you should do so, if it does not prejudice your clients' interests in any way.

Mr. Sonnett: On the assumption, your Honor, that the Special Master is going to rule favorably on a second motion which was before him today, and it was left that rather than speculate as to your Honor's decision, because we were running into conflicting versions of your Honor's tentative thinking as of last night, and I suggested that the Master hear the arguments today and reserve decision until he had your Honor's [24792] Order and then decide these other matters.

One of the motions, which is critically important, involves some additional tax information which will be essential in connection with the deposition of Hughes, and I think very helpful in our position to this forthcoming motion.

I think that the Special Master is going to grant that.

Now that, therefore, will allow a lot of time for Mr. Davis to function on that question, although he doesn't need any help there because Mr. Cocke's firm has worked on the tax problems of Hughes for many years, and is a very distinguished tax partner who could produce all the documents we sought in the motions this morning within a matter of 48 hours.

However, in order—since I anticipate a favorable ruling there and I want Mr. Davis to turn his attention to the more urgent matters involved in this case—I would be willing, your Honor, quite happily, to ask our local counsel, Mr. Fingerly, to ask the vice-chancellor to set this motion down for any time between the 1st and the 11th of February, which Mr. Davis would select.

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I believe he is going to be in California on [24793] February 11th, along with the rest of us, if not earlier.

The other alternative, if I may finish, the other alternative is that we will be tied up in this deposition out there and if Mr. Davis insists that he, rather than Judge Tunnel, should argue the thing in Delaware, it will be some months before it is argued.

So I am perfectly agreeable to any adjournment up to, but not later than whatever time it takes him to get to the West Coast for February 11th, whichever date is agreeable to him and to the vice-chancellor.

Mr. Davis: You are not replying to the reply brief, Mr. Sonnett, which you keep overlooking. It is perfectly agreeable to me and I appreciate your cooperation.

Mr. Sonnett: You aren't representing that you are writing the reply brief?

Mr. Davis: Yes, that is so.

The Court: Pardon me, it is getting late and the sun is beyond the mizzenmast, or something like that.

I understand, Mr. Sonnett, that you will try to arrange for a relaxation beyond February 1st of whatever schedule Mr. Davis is under in the Delaware proceeding.

Now, I am not familiar with the schedule except [24794] that he indicated he had to get something out during the period between now and February 1st. All I ask is that, if you can, do this with all propriety with regard to the interests of your client, and if you can, facilitate the adjournment of that schedule so that Mr. Davis will have his time free for these motions, which he wishes to make before this Court in this proceeding.

Mr. Sonnett: Yes. Mr. Tenney, my partner, your Honor, suggests that we can do that quite readily if we

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have his reply brief a few days before the argument, we can, I am sure, work that out by agreement.

It may be one of the few things we can work out by agreement.

The Court: Now the last thing. On the attorney-client privilege, Mr. Davis in urging the Court that at least the Court should modify the Order of January 10th to the extent that you are not furnished with the documents prior to the Court's ruling on the motion to dismiss.

Mr. Sonnett: As to that, your Honor, it is very hard to answer because we don't know what is in the documents and depending upon the nature of the advice—and I must say I don't understand Mr. Davis' argument—when something is said that a client acted pursuant to [24795] legal advice, that that may not mean that at all. It may mean that the client acted just the contrary to the legal advice.

I am completely lost there. That is one of the more difficult of the many difficult things I have heard Mr. Davis say, but not having seen the documents, I can't tell how useful they would be in connection with the motion to dismiss.

I don't know whether there is advice in there which is now waived which I could stand up in Court and say, "Your Honor, Mr. Davis, or one of his colleagues back a year ago or two years ago, expressed the legal opinion which I join in today," on some point or another. I can't tell.

As to the question of the damage that will be done by a disclosure, I think that is very badly overstated. We have a situation where the first order to produce this material was made many months ago and by a process of trip, stumble and delay, Mr. Davis has kept them out of our hands for many months despite all the pressure from the Court. To say that to make this material available to counsel in-

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volved in this case is going to cause any great public injury, I just don't understand. I don't follow it at all.

[24796] The fact is the Court has directed that we are entitled to have the material. I therefore see no mystery about our having it now as the Court has directed.

The Court: Judge Bromley.

Judge Bromley: I think not tonight, your Honor.

The Court: Mr. Giddings.

Mr. Giddings: Your Honor, in view of the hour and everything that has been said, we will rest on Mr. Sonnett's remarks.

The Court: Mr. Stewart.

Mr. Stewart: No further argument.

The Court: I promised you I wouldn't call on you last next time. I will change that.

I hope to have a formal written order tomorrow, but I am involved in this long criminal case and the committee meeting that I attended between the adjournment of the case this afternoon at 4:30, and coming down here at 5:00, has been adjourned after a half hour because of my leaving until tomorrow at 4:00 o'clock, so that if it is not out by tomorrow at 5:30, it will be out by noon on Saturday morning.

All right.

'Toolco's Notice of Motion, January 22, 1963

[CAPTION]

[2527]

SIRS:

PLEASE TAKE NOTICE that upon the motion of defendant Hughes Tool Company ("Toolco") to dismiss the complaint herein, the papers to be filed in support of said motion by Toolco as provided in the order of the Court dated January 19, 1963, and upon all proceedings herein, the undersigned will move before Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, at such place as shall be fixed by him, on February 8, 1963 at 4:00 o'clock in the afternoon, or at such other time thereafter as shall be fixed by the Court, (1) for an order that the deposition of Howard R. Hughes shall not be taken in this action until after a final [2528] adjudication of the aforesaid motion to dismiss and (2) for such other and further relief as to the Court may seem just and proper.

**Dated: New York, New York
January 22, 1963.**

Yours, etc.,

**CHESTER C. DAVIS, Esq.
Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.**

Transcript of Proceedings Before Special Master
J. Lee Rankin, January 23, 1963

[Doc. 237]

[CAPTION]

61 Civ. 2324

[APPEARANCES]

. . .

[3] Mr. Davis: I have just sent a letter to Judge Metzner which I would like to read into the record, and I will have copies for you, sir, and all counsel here, which reads as follows:

"Dear Judge Metzner:

I was unable to obtain an interlocutory review of your order requiring the delivery to opposing counsel of privileged documents pursuant [4] to your order dated January 10, 1963 as amended by your order of January 19, 1963 and the stipulations between the parties pertaining thereto. In view of the irreparable injury to my clients which would result from prematurely turning over to opposing counsel such documents, as counsel for Hughes Tool Company I must respectfully decline to comply with your said orders, at least prior to a determination of the motions to dismiss now pending before your Honor.

There would be no objection, of course, to furnishing such documents to your Honor so that you may satisfy yourself that nothing contained therein would be useful in connection with your proper determination of said motions.

Very truly yours."

*Transcript of Proceedings Before Special Master
J. Lee Rankin, January 23, 1963*

I have a copy here. I will show this copy to you.

Mr. Barr: Mr. Davis, purely in the interest of making a record, I certainly want to put you on notice that I do consider this to be contempt. I assume that it is deliberately done. May I ask just for the record whether there is any dispute as to whether or not you were as of 5 o'clock this evening [5] required under the existing orders of the Court to produce these documents for our inspection and copying.

Mr. Davis: There is no question in my mind that the stipulation extending the time within which the Tool Company could comply with the order of Judge Metzner dated January 19, 1963 expired at 5 o'clock today.

Mr. Barr: I have one other matter.

Mr. Zeller: I would like to note for the record that it seems apparent that Mr. Davis is going to turn to this in regard to the premature turning over of the documents. This is deliberate flagrant contempt of the Court's order. We certainly have to reserve our rights to act accordingly.

Mr. Davis: I appreciate that. So the record may be clear, you should understand that I, as counsel for the Hughes Tool Company, am satisfied that the Court lacks jurisdiction over the subject matter of this action. I recognize that could develop if I was in error, but I feel it is my duty as counsel for the Hughes Tool Company, and I believe I have precedence for this, to refuse to permit any further action on the part of the parties [6] which would cause any injury to my clients, until after the Court determines the motions which are pending before it, and which establish that there is jurisdiction in the premises.

I know this is not the time and place to argue the merits or lack of merits of such a position, but that is the position.

*Transcript of Proceedings Before Special Master
J. Lee Rankin, January 23, 1963*

Mr. Barr: Mr. Davis, again for the record, I take it you do not contest the jurisdiction of the Court over the counterclaims?

Mr. Davis: There are motions to dismiss those counterclaims now pending before the Court. I recognize that you have taken advantage of the existence of that motion for obtaining a ruling that you were not required to answer those counterclaims, and in the form the motion was made by TWA.

My recollection is a little vague of the extent as to which you supported that position, directly or indirectly before the Court, but whether you did or did not, the fact is that there is pending before the Court, undetermined, a motion to dismiss the counterclaims. By reason of the existence of that motion to dismiss now pending, the additional defendants have not filed any answers to the counter-[7]claims within the time prescribed by the rulings.

Mr. Barr: I take it that you are not persuaded by the efficacy of the motion to dismiss, or any motion to dismiss.

Mr. Davis: If the Special Master feels it would be useful for me to engage in any more discussion with Mr. Barr, the matter is adequately stated on the record.

Mr. Barr: I want to be perfectly clear. I think it is to your advantage as well as ours, that we are clear on this—I take it from your remarks that you do not contest the jurisdiction of the counterclaims.

Mr. Davis: You may assume whatever you want to. At present there are motions to dismiss those counterclaims before the Court. I did resist that motion, but I have no decision on it. I will consider what else is involved after I get a decision on those motions.

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Mr. Giddings: Mr. Special Master, to complete the record on the question of documents, Judge Metzner's order of January 10th directs that the documents heretofore submitted to the Special Master shall be produced.

[8] It goes on to state that if there are any additional documents to which the defendant Hughes Tool Company asserts a non-waive[d] attorney-client privilege, such documents shall be submitted for a ruling to the Special Master by noon of January 14, 1963, and a list thereof furnished at the same time to counsel for all parties.

May I ask through you, Mr. Special Master, whether or not there are such other documents, and whether lists are available?

The Special Master: Mr. Davis.

Mr. Davis: I do not know of the existence of any other documents called for by the rulings of the Special Master heretofore made with respect to the production of documents.

Mr. Zeller: That is not quite the question. The question is whether there are any documents you withheld from production on the grounds of attorney-client privilege.

Mr. Davis: I do not know of the existence of any other documents called for by your Rule 34 motion, which have been withheld on the ground of privilege, that are not in that sealed envelope which I now have, and which represent all the documents that [8A] the Special Master examined. I don't know how clear I can make it.

Mr. Zeller: Well, it is clarified.

[9] Mr. Barr: Mr. Special Master, for your information you should be informed that we have not received any notification or any indication, or any communication of any

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sort from counsel of the Tool Company with respect to the place of taking the deposition, and therefore pursuant to the last sentence of Judge Metzner's order of January 19th, which I think perhaps I should read—"Consequently, unless counsel for the defendant indicates by noon on January 22, 1963, a desire to change the designated place, the deposition shall proceed in the United States Court House in Los Angeles."

We have not received any such indication, and accordingly, pursuant to Judge Metzner's order the deposition will be held at the courthouse.

We are making our arrangements, and for your convenience I want you to be aware of it also.

Mr. Giddings: That applies to the other additional defendants.

Mr. Davis: So no one may take any unnecessary steps, let me say that the Tool Company is not prepared to address itself to whatever problems, if any, exist with respect to the availability of Mr. Hughes at any particular time, until after there [10] has been a determination of the Tool Company's motion to dismiss.

Mr. Zeller: I take it that deals adequately, in your judgment, Mr. Davis, with that provision of Judge Metzner's order, as well as the provision directing you to produce documents. I take it this is something you thought about very carefully before doing it.

Mr. Davis: I trust that it adequately takes care of all the information that you gentlemen need.

Mr. Zeller: I am talking about the expression of the defense that you just made.

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Mr. Davis: Your characterization of the facts, Mr. Zeller, will not change the facts, and you may describe it as you wish. I am prepared to pursue this matter of dismissal. I am satisfied, not only by my knowledge of the facts, but based upon the complaint, the law as I know it, the admissions of the plaintiff on the record, that this court does not have jurisdiction over the subject matter of the complaint, and I am satisfied that ultimately that will be the decision.

Therefore, I feel it is my duty to protect my client from a further burden and annoyances which [11] would be extreme by attempting to make any further arrangements on the assumption that this complaint will continue as a complaint justifying any further proceedings in this action.

Mr. Barr: Mr. Special Master, may I request—we want these documents very badly and we will take whatever steps are available to us.

May I request, sir, and I think that you should immediately inform Judge Metzner at your first opportunity, of contempt of Toolco's counsel so that the Court can take whatever proceedings it deems advisable under the circumstances.

The Special Master: If you ask that this transcript be transcribed promptly, and be sent to Judge Metzner, I will so direct.

Mr. Barr: I do so request. In view of the fact that the contempt has occurred, that you, sir, at your first convenient opportunity, should inform the Court that its order is being held in contempt by the Tool Company.

The Special Master: I shall do so. I assume that any action concerning the contempt will be taken before Judge Metzner.

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Mr. Barr: I have been running that over in my [12] head, sir, and I believe this is his order, and it is before him.

The Special Master: I am not sure what the status of it is. I think it is an affirmance of my order, but you will have to figure out what you think is the proper thing to do, and I will be available.

I do regard it as a contempt. Mr. Davis, I appreciate your position that you claim the Court does not have jurisdiction of the subject matter. I am not sure that that will protect you if the Court during its deliberations has to have a reasonable time to determine that fact, if prior to the time it determines that fact you fail to comply with the Court's orders.

Furthermore, I wish to call to your attention that even though you would maintain your position that the Court does not have jurisdiction of the subject matter insofar as the complaint is concerned, the counterclaims may very well be independent as far as the law is concerned, and this order bears both upon the counterclaims and the complaint, so that the contempt may be valid for failure to produce with regard to the counterclaims even if the Court should find [13] finally that the complaint should be dismissed because it does not have jurisdiction of the subject matter.

I bring that to your attention so that you will not overlook it, and act in such a way as to bring great injury to your client without at least having it in mind.

Mr. Davis: These are matters which I have had in mind, Mr. Special Master, which have been very carefully considered by me.

The fact remains that those counterclaims are currently subject to a motion to dismiss, whatever the grounds, and

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that until the Court has acted upon those pending motions to dismiss, I believe that I am not only justified, but it is my duty to resist further discovery on the basis of the complaint or counterclaims until those pending motions are decided in such a way so as to determine the questions that are involved.

I hand you a copy of the letter that I sent to Judge Metzner, sir. May the record show that I am handing you gentlemen a copy thereof at this time?

Mr. Barr: Mr. Special Master, just so there will be no doubt on the record, I construe Judge Metzner's order as requiring the production for each [14] of us individually, and the right of the plaintiff to receive the documents and the right of any of the additional defendants is equal, but separate.

But so that there will be no doubt on that question, may I ask you to direct the Tool Company to produce those documents only for the additional defendants.

The Special Master: I so direct.

Mr. Davis: The position of the Tool Company remains the same, Mr. Special Master.

[15] The Special Master: I want to call your attention, Mr. Davis—this may be gratuitous on my part—this is a serious action and I am sure you are well aware of that—of the fact that your requests for stays of this action during the efforts to take various action, until the Court will act concerning your motion to dismiss, or for summary judgment, have all been denied, as I understand it, and I think that has an important bearing upon the question of your duty to comply with the order. I merely call it to your attention—

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Mr. Davis: That may be unless those orders are errors as a matter of law. Insofar as the stays involved are concerned, they were for a review of these interlocutory orders, which I did not obtain, since the application for review of the interlocutory orders were denied, or at least the decisions covered both.

I am aware of the fact that I had previously made an application to Judge Metzner for a stay with respect to the application of the provisions relating to the production of the privileged documents. I am aware of those matters.

The Special Master: I do not mean to argue [16] the matter with you, Mr. Davis, and I am sure you do not mean to.

I am just trying to make sure that you are not overlooking any of these things which I think have a serious bearing upon the whole question.

Mr. Davis: I have tried not to overlook anything.

Mr. Barr: Let me say again so that this record is clear, that whatever the appeals, the Second Circuit, this afternoon at about 4:00 o'clock, denied Mr. Davis' application for a stay of Judge Metzner's order requiring him to produce those documents, which have been extended by stipulation until 5:00 o'clock.

It denied his petition for leave to file a petition for mandamus, and it dismissed the appeal that he took yesterday afternoon—that the Tool Company took yesterday afternoon—with respect to both of Judge Metzner's orders of the 10th and the 19th of January.

So that there is no motion of any sort pending with respect to either of Judge Metzner's orders, or with respect to the privileged documents.

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The Special Master: Mr. Zeller.

[17] Mr. Zeller: There is one other matter I would like to turn to, if I may, Mr. Special Master, and that is to the order which your Honor recently issued requiring the production of what we might call the tax documents, for lack of a better shorthand expression.

I would like your Honor to direct at this time that at the time of production of those documents, that any documents called for by that motion which the Tool Company desires to withhold under a claim of attorney-client privilege be submitted to your Honor for consideration and a ruling, and that a list of such documents be furnished at the same time to us.

The Special Master: Mr. Zeller, I am not clear—maybe you can help me—as to whether there is anything open that the Tool Company could claim a privilege on.

Mr. Zeller: I don't know. It is the way Mr. Davis responded earlier on this question, your Honor, when we asked him whether there were any other documents being withheld on grounds of attorney-client privilege.

His response was, if you will recall, that there were no documents called for in our original [18] Rule 34 motion which he was withholding on grounds of attorney-client privilege.

A new category has been opened up by your Honor's granting of the additional Rule 34 motion here recently.

It may well be, and I suspect it will be, that there will be documents called for in those categories which the Tool Company will assert a claim of attorney-client privilege on.

My request is simply for a direction that if that be the case, that the documents against which any such claim be

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asserted, be submitted to your Honor at the same time production is made to us of the clearly non-privileged documents, and that we be given a list of the documents as to which the claim is made.

The Special Master: Mr. Davis, do you wish to comment on that request?

Mr. Davis: May I say this, Mr. Special Master: I am informed that it would be physically impossible to gather the documents covered by your last ruling with respect to the production of documents within the time specified therein, irrespective of any other objections that we may have.

[19] I base that upon information I received from Mr. Cook that it would take weeks to try to gather all of the material called for if the Tool Company were in fact properly required to produce such material.

Therefore, at this juncture I know of no claim of attorney-client privilege with respect to the material called for.

I haven't the slightest idea whether there would exist or would not exist any documents which would fall into the category of attorney-client privilege when that is done.

But to be sure, some of those documents would be located fairly soon, but to produce all that were called for would not be feasible within the time allowed.

May I also state that it will be our intention to seek a review of the ruling, and of course, we also are confronted with the position which the Tool Company has indicated today it intends to take and maintain, until after there has been a determination of the motions pending before the Court.

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I am not going to try at this time to address myself to all those various things, but I have given [20] you at this time all that I know on the subject.

The Special Master: I will grant your request then, and direct that the Tool Company furnish such documents and lists thereof at the time of production.

You may incorporate that in your request for a review, if you like.

Is there anything further, gentlemen?

Mr. Zeller: I think that is it.

(Whereupon, at 5:30 p.m., the hearing was closed.)

Toolco's Notice of Motion, January 25, 1963

[Doc. 152]

[CAPTION]

61 Civ. 2324

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that defendant Hughes Tool Company ("Toolco") will move before Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, at a time and place to be fixed by him, and upon such papers as he may direct, for review of the order of the Special Master of January 22, 1963 requiring Toolco to produce for inspection and copying by opposing counsel certain new and additional documents recently requested which the Special Master has ruled are entitled to confidential treatment, and which are more fully described in the schedule attached to the affidavit of John Hupper filed in support of the motion to produce, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.

January 25, 1963.

Yours, etc.,

CHESTER C. DAVIS, Esq.
Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.

[To All Attorneys of Record]

[24799]

Pretrial Hearing, January 28, 1963

[CAPTION]

BEFORE:

HON. CHARLES M. METZNER,
District Judge

* * *

[APPEARANCES]

* * *

[24801] The Court: Mr. Davis, you filed a notice of motion setting down for hearing an application by you to adjourn taking the deposition of Mr. Hughes. You made it returnable——

Mr. Davis: Four o'clock, February 8th, your Honor.

The Court: Yes, I assume from your subsequent correspondence you are withdrawing that motion.

Mr. Davis: That is correct, your Honor. The only purpose of filing that notice of motion was merely to give your Honor an opportunity by mechanical means to carry out what your Honor indicated you intended to do in your January 10th and January 19th order, and at this time I have no motion or application to make.

The Court: You don't have to actually because I think I indicated in that order that after reviewing the papers, if I thought the deposition should be adjourned, I would notify you to that effect.

You did not have to——

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Mr. Davis: Your Honor, it was just a question to have something before your Honor to [24802] act upon. That was the only purpose that I had in bringing on that motion, and I am pleased to withdraw it at this time.

The Court: Secondly, we have your application to review the order of the special master regarding the production of the so-called tax documents.

Mr. Davis: That is correct, your Honor.

The Court: Let us hear argument on that.

Mr. Davis: All right, your Honor.

I am not prepared to present to the Court at this time all the facts and circumstances relating to the problems of the Tool Company in connection with the production of those documents. I have been in communication with Mr. Holliday in Houston, who in turn reported to me the information he obtained there. I am prepared to give that information to your Honor orally now.

I would hope to have an opportunity to submit an appropriate affidavit identifying what those circumstances are and perhaps more fully or accurately than I can state them now.

I am sure your Honor will appreciate that I have been addressing myself primarily to the problem [24803] of the papers that I am to file by February 1 on the very important motion to dismiss that we have brought on, which is now pending before your Honor.

Quite apart from any other consideration, I am informed that in order to review the files which would have to be reviewed to reduce the documents which are called for by the schedule annexed to Mr. Hupper's affidavit it would require a review of substantially all of the same files which were reviewed once before in connection with the production of documents which was made pursuant to your

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Honor's order of, I believe it was, March of last year. In other words, there is no way that all the documents called for by that schedule could be produced other than by reviewing substantially all of the files, both in Houston and in Los Angeles, which were reviewed once before.

I am informed that it is the opinion of those who are familiar with those files that probably all the documents called for have already been produced and made available to plaintiff and these additional defendants. To be sure, that does not include the 1961 tax return or the 1962 tax return called for, which is not yet prepared, and [24804] of course that is not available.

I am also informed that based upon the actual cost and expenses incurred in connection with the prior review of the files and production, it is estimated that the cost of doing this at this time would be conservatively at least \$150,000.

I am also told that in order to review the files which would have to be reviewed it would take a period from four to six weeks.

I am also informed that at this time, particularly with the year end and the work which has to be done in connection with year-end tax returns, federal and state, the closing of the books, the individuals who are familiar with or who could most readily identify the documents called for, which relate to information that was used in connection with the review by the Internal Revenue of whatever tax returns were filed or whatever questions were raised, are all at this time busily engaged on other matters.

Now, this is the substance of what I was told. I have asked that it be put in affidavit form so I could submit it to your Honor. I expect to have it shortly. I am not in a position to per- [24805] sonally supervise the preparation of the affidavit.

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However, in that connection, your Honor, I think that I should also state that the Tool Company believes quite sincerely that the motion to dismiss is entitled to not only the most careful consideration by the Court but, notwithstanding the indications given on the record by the Court, is firmly convinced that the action will be dismissed and therefore has asked me to resist as respectfully as I can granting to these plaintiffs or additional defendants further discovery causing any further expense or burden upon the tool company until after the Court has either decided the motion to dismiss or has satisfied itself that it is a meritorious motion to dismiss.

While I am up I will cover all the ground at once, and, without suggesting that I believe that the Court is likely to require that the tool company incur the burden of expense I have attempted to describe prior to a consideration of our motion to dismiss, I would like to respectfully suggest that, if the Court is of a different view, as in the case of the privileged documents, which the Court's order [24806] of January 10th and January 19th required me to produce—and I exhausted my efforts to obtain a review of those orders unsuccessfully—I be given an opportunity of developing some procedure so that I may have some kind of an order which would be appealable, because I know that I still have to convince your Honor that the motion to dismiss that we are bringing on is a meritorious one.

I believe that when I submit my papers on February 1, and they are not going to be in as well organized a shape as I would like them to be—I am running behind schedule—I believe that your Honor will be satisfied, whichever way your Honor will decide the question, that it is a serious and meritorious question, and I can personally assure your Honor that the desire on the part of the Tool Company to resist further production or discovery proceedings by the

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plaintiff at this time is not for the purpose of interfering with the expeditious disposition of this lawsuit.

I would like to finish my remarks by pointing out that somehow or other the issue seems to have developed as to whether or not Mr. Hughes will or will not be available on a particular date [24807] and whether or not the tool company will or will not make further production of documents, rather than the question which basically the Tool Company has sought to bring on for disposition, and that is whether or not this Court should entertain any further the action commenced by this complaint. And I think at this point perhaps I should address myself, unless it would be preferable that I wait in connection with the application which is being made to withdraw the motion to dismiss the counterclaims——

The Court: I assume that would be in answer to what they have to say, because you still do have at the present time the counterclaims pending; so even if you were successful on a motion to dismiss the complaint, you still have counterclaims totaling \$385 million for which Mr. Hughes' deposition is also scheduled.

You can answer that after we hear from the plaintiff and the additional defendants on the question of the production of the so-called tax documents, and then I will come back to you, Mr. Davis, because I am sure you will be answering that question on the counterclaims.

[24808] Mr. Davis: All right, your Honor.

The Court: Who wants to start off—Mr. Sonnett or Judge Bromley?

Mr. Bromley: May it please the Court, I take it from what we have just heard that Mr. Davis does not now dispute the correctness of the special master's finding that good cause has been shown for the production of the documents requested under the Rule 34 motion; that said docu-

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ments are all relevant; that it does not present a new or novel contention because the plaintiff many months ago was put on notice that we wanted these documents; that we were making the contention that the Tool Company made a profit and received tax advantages from its transactions.

I take it that he no longer disputes that the documents are important and necessary and that his sole argument is related to the burden and that he wants more time.

Well, the master recognized that there was a burden, but found that it was not an unreasonable one and that he should comply, because it was highly important that we have the documents prior to the taking of the deposition of Mr. Hughes.

[24809] Now, as your Honor has indicated, I am not at all concerned with his motion directed toward the complaint because I am perfectly clear that the counterclaims will stand, and I assert that I have a right to examine Mr. Hughes and to get these documents all in relation to my examination with respect to the counterclaims.

I therefore take it that it is perfectly clear that the special master's action should be affirmed by you and that we should proceed to give our attention to the question of how serious, if at all, the question of burden really is. And I think you, Mr. Sonnett, should express your views in that respect of that matter to his Honor.

The Court: Mr. Sonnett.

Mr. Sonnett: Yes, your Honor. I have a short answering affidavit in connection with Mr. Davis' appeal on the tax document matter. With the Court's permission I would like to serve it and file a copy now. It has some facts which I think should be in the record before your Honor on this question of burden.

The Court: Go ahead.

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Mr. Sonnett: Does your Honor wish to [24810] examine that affidavit or shall I paraphrase it?

The Court: You might as well paraphrase it.

Mr. Sonnett: In paragraph 2, your Honor, the affidavit adverts to the findings by the special master based on his intimate familiarity with the discovery matters in this case.

The burden of production on the Hughes Tool Company of these documents at this time is in fact reasonable.

Secondly, in paragraph 2 of the affidavit we refer to that portion of the special master's ruling in which he adverted to the fact that employees and counsel of Houston, Texas, who have for many years represented Tool Company generally as well as in its tax matters, could assist in the production to such an extent that the burden upon Mr. Chester C. Davis and his associates in connection therewith should not be great.

In paragraph 3, your Honor, the affidavit develops the fact—and we believe it to be the fact—that a substantial amount of work has been done previously in assembling various material which will be of help in connection with this matter. [24811] such as supporting papers, work papers relating to financial statements, and other detailed financial information.

That became known to us first about a year ago when they were producing documents at Houston, Texas, and at that time they withheld two or three boxes of work papers which were said to contain supporting work papers relating to financial statements and the like. That matter was brought to the attention of the special master on March 22, 1962, and it resulted in a direction by consent in effect that that material be held in the custody of Mr. Cook's firm for delivery as might be required later.

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In paragraph 4 of the affidavit we point out that the Andrews, Kurth, Campbell & Jones firm, which is undoubtedly one of the leading firms in Texas, has been counsel for the Hughes Tool Company for some 50 years; that Mr. Cook has been personally engaged in the legal and financial matters of Hughes Tool Company for over 10 years, this by their own statements.

Accordingly it seems to us that with the resources available in the Andrews, Kurth firm, the [24812] production of documents, if there is a will to do it, be made promptly and, indeed, could be made by Wednesday, recognizing, however, that the master of production of documents is always a burden on any litigant, as it has been, I can assure the Court, in the case of TWA, where we have produced hundreds of thousands of documents at great expense to our minority stockholders—recognizing that burden, however, our proposal in this affidavit is that your Honor direct that whatever is available now be produced by January 30, 1963, as the master has directed; that your Honor further direct that there be a production on a day-to-day basis thereafter until the production is complete, and that it should be complete on February 6, 1963, which would mean about a week's extension of time to make the production, which the master has found, in fact, could have been made on the 30th of January.

As to the importance of the TWA viewpoint in producing the documents, I think it speaks for itself, your Honor. We want them not only for the deposition of Mr. Cook, but it is my opinion and belief that these documents when we get them, may [24813] be of considerable importance for the motion which Mr. Davis is now at long last pressing on and insisting be pressed to your Honor in the Hughes deposition.

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I think that materiality is evidence, your Honor, from the fact that I hold in my hand documentary proof from the Bank of America files of statements made by Mr. Hughes himself in 1960 and statements made by Mr. Noah Dietrich in 1960 specifically pointing out that the 102 tax problems had always been and were at the heart of the Hughes problem, and I propose to establish on the record to date, and certainly so out of Hughes' mouth when he is deposed, that because of the tax problems of Hughes Tool Company and Mr. Hughes personally they engaged in the course of conduct alleged in our complaint and that that course of conduct undeniably violates the antitrust laws and was not and could not be exempted or dealt with by the CAB.

So I would like to have these papers in connection with his motion as well as in connection with the deposition.

Thank you, your Honor.

The Court: Mr. Chandler?

[24814] Mr. Chandler: I have nothing to add to the statements of Mr. Sonnett, your Honor.

The Court: Mr. Stewart?

Mr. Stewart: I join very heartily in the statements that Judge Bromley and Mr. Sonnett made.

The Court: All right.

Mr. Davis: May I reply?

The Court: Surely.

Mr. Davis: If your Honor please, I don't know about the facts referred to in Mr. Sonett's affidavit. I do have a recollection about some arrangements that some work papers were to be kept by Mr. Cook pending some determination of confidentiality. As far as I know, they were all produced, but I don't know what the facts are in that regard.

What I would like to address myself to primarily, however, is to the assumptions made by Judge Bromley in his

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remarks that I am conceding that there was good cause or relevancy in the documents called for. That, of course, is not an accurate statement of my position. My position is at this point I am not prepared to address myself to [24815] that request or to that review of the special master's order. I simply have not had time to prepare in view of my efforts to work on the brief.

May I point out, first of all, how the additional defendants are affected by whether or not the Tool Company made a profit or did not make a profit or obtained some tax advantages reviewed by the Bureau of Internal Revenue with respect to its control or exercise of control of TWA, I just don't see how that establishes any relationship whatever to their defense.

In so far as plaintiff TWA is concerned, Mr. Sonnett just said that this will indicate to give an explanation as to why Mr. Hughes engaged in the course of conduct allegedly in violation of the antitrust laws.

I respectfully submit, your Honor, we are not concerned as to why someone violated the antitrust laws; we are concerned with whether they were violated, and I respectfully submit that whether or not the Tool Company did or did not make a profit in transactions which were reviewed and approved by the CAB and whether or not the purpose or objection or reasons why the Tool Company acquired 78 per cent [24816] control of TWA was because it would put it in a position where it could employ its cash and thereby avoid whatever is to be avoided against an improper accumulation of cash, and whether or not that was done by buying more securities of TWA or by providing funds for the acquisition of aircraft by TWA, I just don't understand how that can be said to be seriously documents that they have to have for the purpose of establishing

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either that the Tool Company or Mr. Hughes engaged in a violation of the antitrust laws or how they could conceivably afford a defense to any of the counterclaims.

It is respectfully submitted at this point, however, that I am expressing this as what seems to me to be a rational reaction to the statement that I have heard, and I respectfully request the Court for an opportunity to address more fully on that question.

The Court: You have had this problem for a long, long time. I don't think you need any more time to present your point of view on this.

There is nothing new; it has been hanging around for several weeks.

Mr. Davis: What has been hanging around [24817] for several weeks, your Honor?

The Court: This production of the documents. What was the date of your affidavit before the special master?

Mr. Davis: The special master's ruling——

The Court: You prepared yourself to oppose the ruling of the master, you must have prepared yourself for this too. What is the date of the Hupper affidavit?

Mr. Bromley: January 9th.

The Court: Today is January 28th.

Mr. Davis: That is correct, your Honor, and I can assure you that between January 9th and now I have been on one matter or the other constantly in connection with this litigation.

I would also like to point out that I have lost two, almost three days of the time that was allotted to me by the Court in connection with the preparation of this material relating to this motion to dismiss. One of them was I received a request to attend a subcommittee of the Senate Judiciary Committee, it is called some Antimonopoly Committee, with

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Senator Kefauver with reference to the Pan American-
[24818] TWA merger and whether or not there was any pressure being applied on Mr. Hughes or the Tool Company in connection with this Pan-American-TWA merger. I have received two calls today from the Justice Department on the same question, and between times your Honor knows I have had to prepare papers and appear before the Court of Appeals——

The Court: This is your choice, not mine.

Mr. Davis: I understand that, but nevertheless I don't believe the circumstances here present indicate that the Hughes Tool Company is not entitled to whatever efforts it is entitled to make in order to protect what it believes to be its rights. I don't think there can be any question that if, in fact, as we claim we are going to be able to satisfy your Honor shortly, this complaint lacks merit and is a matter which is not properly before this Court but should be properly before the CAB, I respectfully submit that there is a grave injustice being done by requiring the Tool Company to do any more than it already has done.

The Court: You already have boxes of this stuff that you have gone through. Turn it over.

[24819] Mr. Davis: That is what happens when we get the facts piecemeal. That is not compliance with the schedule that Mr. Hupper has stated. That was compliance with your Honor's order as construed by the special master with respect to what we in fact did produce on March 15th and April 15th of last year.

The Court: You have it, haven't you, and it has been gone through?

Mr. Davis: They have been made available, your Honor.

The Court: These three boxes, I understand, have not been made available.

Pretrial Hearing, January 28, 1963

Mr. Davis: Your Honor, all I know is that Mr. Cook assumed the responsibility with respect to that production. The special master required that somebody be done, and it was done. There was a ruling with respect to treating it with confidentiality.

If what we are talking about is this affidavit by Mr. Hupper, I frankly do not know what is in this affidavit, and I am not in a position to either analyze what is in those boxes, if there are any such boxes——

【24820】 The Court: Mr. Cook is, though, isn't he?

Mr. Davis: Mr. Cook has been engaged as I have been——

The Court: Let us get one thing straight. Has the material in the three boxes been turned over to parties in this litigation?

Mr. Davis: Have they been?

The Court: Yes.

Mr. Davis: I haven't the slightest idea.

The Court: Why don't you ask Mr. Cook tonight. If they haven't, turn them over.

Mr. Davis: I will do that.

Mr. Bromley: Of course not. They have been refused.

The Court: He has had them for a long time.

Mr. Davis: Your Honor, I cannot say any more sincerely than I have already said that it seems to me—and I believe I have authority to support it, if I had time to present it to your Honor—that there is a serious motion to dismiss this complaint.

【24821】 The Court: You have argued that before the Court of Appeals.

Mr. Davis: No, your Honor. The only thing I have argued before the Court of Appeals was whether or not the order of this Court with respect to privileged documents was appealable and therefore reviewable.

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The Court: I read what you said before the Court of Appeals. You went beyond that narrow point, Mr. Davis.

Mr. Davis: Now, your Honor, if your Honor has the record of the argument before the Court of Appeals and the notice of appeal that was filed, you are fully informed as to what took place there. All I can say, your Honor, is that it was one order which covered the production of the privileged documents and referred to other material. In order to obtain a stay from the Court of Appeals it was necessary for me to have an appealable order and my understanding of what the Court of Appeals did was to refuse to recognize that the order requiring the production of documents was appealable and thereby denied me a stay and did not consider my [24822] writ of prohibition——

The Court: Did not.

Mr. Davis: Did not.

The Court: I think Judge Lumbard directed you to argue all three items before him. It says so in the record.

Mr. Davis: If your Honor please, it turned out to be that I was denied leave to file it. That is what the order of the court was.

Mr. Sonnett: It was on our cross motion which was before the court.

Mr. Davis: I came back from Washington your Honor, on Tuesday, late Tuesday afternoon, having spent the day with this Kefauver committee, which, like everybody else, takes the position, an independent branch of the government—I tried to tell them I was busy in a court proceeding—that it is none of their concern, and found myself in the Court of Appeals the next day; and I respectfully submit to your Honor that I did not argue my writ of prohibition and that all that has happened so far has been that the order of this Court with respect to privileged docu-

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ments was held to be nonreviewable, and I am prepared to follow whatever [24823] procedure is the appropriate procedure to follow in order to obtain what may be a reviewable order.

The Court: Well, I come back. It appears that Mr. Cook has two or three file boxes of work papers supporting the financial statements sent to the special master which had been held pending determination of their confidentiality, which means they have been reviewed and you know what is in them, and they have been there since March of 1962.

Mr. Davis: I will be perfectly happy, your Honor, to get what the facts are and submit them to your Honor. I am just not in a position to give you the information that you are asking me for.

The Court: Call me tomorrow morning and let me know.

Mr. Davis: I did not hear what your Honor said.

The Court: Call me tomorrow morning after you have spoken to Mr. Cook. At your suggestion Mr. Cook has them, according to this transcript before the special master, if Mr. Sonnett has correctly reproduced the transcript.

Mr. Davis: I will undertake to give the facts to your Honor tomorrow morning.

[24824] The Court: But I can't see any reason for any more time to argue why these things should not be submitted. You have had that same problem with even a greater degree in the attorney-client privilege asserted by you.

Secondly, I haven't heard anything about the question of, assuming that the complaint is dismissed, which is what your goal is now, the six counterclaims that are still pending in this court asserted by you against the plaintiff and the additional defendants.

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In regard to the plaintiff, the plaintiff has moved to withdraw its motion to dismiss the counterclaims, and the additional defendants have filed their answers to those counterclaims, and Mr. Hughes is being deposed on those as well as upon the complaint, so I can't see why this material can't be furnished.

And let me hear from you, Mr. Sonnett, on your motion to withdraw your motion to dismiss the counterclaims.

Mr. Sonnett: Yes, your Honor. Before coming to that, and in order that the record be perfectly clear, may I call to your Honor's attention [24825] pages 18 and 19 of the transcript of January 23rd before the special master, because there, as again I believe here, what Mr. Davis was contending was that he had received information from Mr. Cook, because obviously Mr. Cook is the source of all Mr. Davis' information on the matter of these documents.

At the top of page 19 of that transcript what Mr. Davis said, which I think he has again said here, is that it would take weeks to try to gather all of the material called for if the Tool Company were in fact properly required to produce such material.

I am confident, your Honor, that on the basis of the 50 years that Andrews, Kurth has represented the Tool Company and the over 10 years that Mr. Cook has been in intimate contact with their financial and other matters that firm is quite capable of producing within 48 hours 90 per cent of the material called for by this motion, including the three boxes of work papers in connection with financial statements that were segregated a year ago.

It seems to me that they therefore should be required to produce that which is now available and to continue producing until some date [24826] prior to the Hughes deposi-

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tion and complete it so that we have the opportunity of looking at the documents.

Mr. Davis' problems about understanding the relevance of the tax aspects of this can be set at rest if he would only read the statements that Mr. Howard Hughes made to the Bank of America in December of 1960 because Mr. Hughes understood the relevance very clearly of his tax problems and the course of conduct which he followed with respect to TWA.

The Court: What about your motion to withdraw your motion to dismiss the counterclaim?

Mr. Sonnett: Yes, your Honor.

We served our motion on January 25th, your Honor. As my affidavit indicates——

The Court: I wish you had done it a couple of weeks before. I have wasted a lot of time.

Mr. Sonnett: I can only suggest to your Honor the question of Pandora's box, or the lady and the tiger, and perhaps only your Honor would be the one to know, but I do regret that it wasn't done sooner. My only excuse for that is that I know [24827] how much the Court has to do anyway on this and other cases, and that is that when I was advised, as I was, that the additional defendants had seen fit to answer these counterclaims and took the position, as I did, that that was a matter for them and not for TWA, in view of the fact that they were going to answer the counterclaims, it seemed to me that the procedural morass that would then result was one that TWA should try to avoid and, in the interest of trying to avoid that, it seemed to me I should ask your Honor's leave to withdraw the motion to the extent indicated in our motion papers, namely, to the extent that we seek now to keep the motion alive, in effect, only with respect to a portion of counterclaim 2, that

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is to say, a portion of our attack on counterclaim 2, and with respect to paragraph 6——

The Court: You mean it doesn't state a claim under 408; is that the part you are keeping alive?

Mr. Sonnett: Yes, your Honor. It fails to state a cause of action.

In so far as we pressed on your Honor a highly technical and complicated set of motions [24828] addressed to the point that the counterclaims were not proper under Rule 13, in light of the present posture of the case, and the fact that the additional defendants have answered, it seems to me TWA's interests are best served by our withdrawing the motion to that extent and asking your Honor for leave to reply to the counterclaims when we have examined Mr. Hughes.

On that point the derivative nature of the counterclaims, assertedly derivative nature of the counterclaims that would be left in the case, I think, make it particularly appropriate if we give Mr. Hughes a chance to tell us what he knows, not only about the allegations of the complaint, which I take the stand denied, regardless of this motion, but as well as the allegations in the counterclaim which, so far as TWA knows to date, are not true.

That is our position, your Honor.

The Court: Mr. Davis.

Mr. Davis: Your Honor, the reason given by Mr. Sonnett for withdrawing his motion on the counterclaims is indeed fascinating because the reason that the additional defendants did not answer [24829] the counterclaims was, when they argued before the special master that they should not be required to answer the counterclaims by reason of the motion to dismiss which was pending, the special master over my objection granted the request of the additional

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defendants to delay answering the counterclaims while the motion to dismiss was pending; and now, if I understand Mr. Sonnett correctly, upon hearing that the defendants were ready to answer the counterclaims, he withdraws his motion.

I appreciate, your Honor, I haven't had time to really think about what this maneuver really means, because at the same time I understand that counsel for the additional defendants is bringing on a motion returnable the 18th of February to dismiss the counterclaims with prejudice as punishment for alleged contempt by reason of the fact that I have withheld these privileged documents.

What it appears to be, your Honor—and this is a matter of extreme seriousness, and unfortunately it involves matters which are not before the Court relating to this Pan American-TWA merger—but what this means, your Honor, is a development [24830] of a sacrosanct—

The Court: Thank you.

Mr. Davis: —date, February 11th.

Now, what is it about February 11th, or any other date in the neighborhood of February 11th, which is of such vital importance to this plaintiff or these defendants where even our effort to have a most serious motion to dismiss considered by the Court, nothing should interfere with the date of February 11th? That became—

The Court: Let me ask you a question, Mr. Davis. If the date was April 11th, could I have had your motion to dismiss the complaint for summary judgment?

Mr. Davis: Yes, your Honor.

The Court: I would have?

Mr. Davis: Your Honor, let me put it this way. That motion was made, as I believe the rules require, upon the basis of the complaint. My Rule 11 motion was—

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The Court: If you had noticed it for argument and if I had fixed the date of Mr. Hughes' deposition for April 11th—

Mr. Davis: Of '63?

[24831] The Court: —and adjourned the master's fixing of the date of February 11th?

Mr. Davis: Your Honor, whether I was right or wrong on this, let me at least explain to you what I was doing, and this is basically a problem which I think is an interesting one from the point of view of the rules.

We have the concept that a complaint does not have to be as explicit as it used to be in some pleadings. Therefore, we then approach it next that a plaintiff who has seriously brought on a claim—I would not say in this case the plaintiff is represented by counsel who is inept at drafting pleadings, but in other cases it may be—I understand some of the rulings of the Court of Appeals to be that courts lean over backwards in giving a plaintiff opportunity to adequately explain or demonstrate what it is he is complaining about.

The Court: Pardon me, Mr. Davis. I have just one question to ask you, and I think the answer can be a simple one.

If on January 10th I had adjourned the deposition of Mr. Hughes from February 11th to April **[24832]** 11th, and if I had acceded to your request that you proceed with the deposition of Ben-Fleming Sessel and Mr. Wadsworth, do you tell me that I still would have received a notice of motion from you dated January 14th to dismiss the complaint for summary judgment?

Mr. Davis: Your Honor, the answer is yes to your Honor, but let me say there is only one thing that I don't want to be misunderstood on, and that is what I was waiting for was not a decision about Ben-Fleming Sessel or Wad-

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sworth; the only thing that might have delayed my bringing on the motion to dismiss until January 14th was or would have been the ruling with respect to the answer to interrogatories under Rule 16.

Had your Honor on January 9th granted the application for a Rule 16 proceeding that we made, referring to the special master or to the Court, or had your Honor required the interrogatories to be answered, then there is no question in my mind that I would have withheld the making of the motion, because then I would have made a motion both under Rules 11 and 56.

Now let me say one other thing, your [24833] Honor. At the present time the motion, the papers that I will file with you on February 1, by noon, in whatever condition they may be——

The Court: They will be in good condition, I am sure.

Mr. Davis: Not in the condition they should be in, your Honor.

I will call your Honor's attention that as a practical matter I am forced to abandon my Rule 56 motion and I have to proceed solely on the Rule 12 motion.

The other impetus which permits me to tell your Honor, with no question whatever in my mind that such a motion had been made, was a decision of the Supreme Court in the Panagra case.

The Court: You did not even know about it when you filed the papers with me.

Mr. Davis: Your Honor, I had been relying on the Panagra case for some time. To be sure, both sides had been using it.

The Court: You did not know when the Panagra case was coming down, and your papers were prepared before it came down.

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Mr. Davis: The minute your Honor [24834] indicated to me that your Honor had decided not to give me a Rule 16 proceeding and no answers to interrogatories, at that point, so far as I was concerned, there was going to be no further opportunity to elicit from the plaintiff what the basis is for this complaint, what is the course of conduct on which they are relying, and at that point I had no more any reason whatsoever but to test the theory which I had adhered to from the time this complaint was filed, that this complaint and the subject matter of this complaint was improperly in this court.

However, I naturally, so long as the Court would permit me to adduce from the plaintiff what is (sic) is that the plaintiff was claiming—now, the notice for taking the deposition of Mr. Sessel, which had been made at the time the complaint was filed and which was covered by the earlier orders of the courts, your Honor—and, as I explained to the special master, I was treading water, your Honor, from October of 1962, until your order of January 9th, proceeding with taking oral depositions in the face of what the special master said on the record repeatedly, that there was no question that I was not [24835] going to be able to find out the facts I was seeking because TWA quite candidly said, "We don't know the facts." The facts are in the knowledge of counsel who investigated the facts and there is only one way to get at that and that is by interrogatories.

I could have examined every officer of TWA and know no more than I know today. I could have called your Honor's attention to Mr. Rummel's testimony, to Mr. Cocke's testimony, to Mr. Tillinghast's testimony. None of them know of any course of conduct violating antitrust laws. They say this complaint is because of what counsel recommended

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because of their investigation. They asserted the work-product and attorney-client privilege, and here I am.

The minute your Honor denied me the answers to interrogatories until after we were examined—and there is no question that for the Tool Company to proceed with these depositions in Los Angeles will involve the expenditures of vast sums of money. Now, that has nothing to do with respect to the availability or lack of availability of Mr. Hughes and, so far as I am concerned, your Honor, I would have brought on that motion to [24836] dismiss, as I was prepared to argue that motion to dismiss shortly after it had been referred to your Honor for all purposes——

The Court: Except you acquiesced that it wasn't timely to bring on.

Mr. Davis: Your Honor, I always recognized, and I am prepared to recognize at this date, that I am prepared and I am so confident of my facts that I am prepared to let this plaintiff, any time he wants to, present whatever facts he wants; not for the purpose of raising an issue of fact, I will admit every fact he asserts and ask for a decision on the law, I will admit every answer he gives me on interrogatories.

It seems to me I should have an opportunity to do that. An issue of fact is raised, your Honor, only if I were to deny anything, if I were to deny what they say, but I need a statement under oath, I don't need a statement under oath by any officer of TWA claiming to have knowledge of the facts and I admit them. They can use those facts either for the purpose of construing the complaint or anything else they please, and I ask for a determination of the case on the law, and if I am wrong on [24837] that, your

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Honor, I will make a commitment. Then we proceed to the assessment of damages.

Mr. Sonnett: What Mr. Davis just said—or else I am having trouble with my hearing—it is like someone once said, "Listening to him is like trying to nail a custard pie to a wall," but if he said that he admits the allegations of the complaint, TWA now moves for judgment on his admissions and for the relief sought in the complaint.

The Court: I don't think he said that.

Mr. Sonnett: I am not sure. I never know exactly what he is saying except that he wants to use the Federal Rules for himself, the Tool Company, but he doesn't want anybody else to use them.

The Court: All right. That takes care of three matters I have here.

Review the rulings of the special master regarding the production of the tax documents: I will give you until tomorrow to tell me about those three boxes of papers, Mr. Davis, and I will then decide the matter. I see no necessity for additional time for additional argument on the question of the counterclaims.

I assume everybody has finished talking [24838] about TWA's motion to withdraw the motion to dismiss the counterclaims. That motion is granted with leave to TWA to file their answer 10 days after the conclusion of the deposition of Howard Hughes.

I have an application here which I received at 2:30 this afternoon, and I assume other counsel have received it, from an attorney for Mr. Tillinghast—

Mr. Davis: I don't believe I have that, your Honor.

The Court: You don't have it?

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Mr. Harrell: Mr. Davis, your office was served with it Friday evening.

The Court: —to answer the counterclaims within 10 days after the conclusion of the deposition of Howard R. Hughes.

Do you want to say anything in opposition to that, Mr. Davis?

Mr. Davis: No, your Honor. I suppose it is the same thing that TWA is doing.

The Court: Yes, the same disposition on that.

I have one other thing here, a question I wanted to ask you, Mr. Davis. [24839] You wrote me a letter January 23rd which has been made part of the record before the special master. I will just refer to the last three lines of the second sentence in that letter, which read:

"I must respectfully decline to comply with your said orders, at least prior to a determination of this motion to dismiss now pending before your Honor."

The question I want to ask you about those three lines is: did you make this decision on your own, or did you discuss this with your client?

Mr. Davis: I discussed it with my client, your Honor.

The Court: All right. That is all.

Mr. Stewart: If your Honor please, one other item.

Additional defendant Dillon Read has not as yet answered the counterclaim, and under the prior state of the record had until 30 days after your Honor's decision on the motion of TWA to dismiss the counterclaim.

May I at this time apply for 30 days in which to formulate our reply to the counterclaims? [24840] Since the mo-

Pretrial Hearing, January 28, 1963

tion is now withdrawn, there will therefore be no decision, presumably, and we would like to have this additional time to prepare a reply.

The Court: I don't think you can have 30 days. I certainly think your answer ought to be in by February 11th, the date of the deposition.

Mr. Stewart: That would be perfectly satisfactory. That is fine.

The Court: All right.

A-2642

Letter from Chester C. Davis to Metzner, J.,
January 29, 1963

[Doc. 448]

[LETTERHEAD OF CHESTER C. DAVIS, NEW YORK 5, N. Y.]

January 29, 1963

C O P Y

BY HAND

Re: *TWA vs. Hughes Tool Company, et al.*

Hon. Charles M. Metzner
United States District Judge
United States Court House
Foley Square
New York, N. Y.

Dear Judge Metzner:

Referring to the request of Your Honor for a report with respect to the material referred to in the affidavit of Mr. Sonnett served upon me in Court yesterday, and the conversations that Mrs. Lea had with your law clerk this morning, there is annexed hereto a self-explanatory telegram I have just received from Mr. Gray, a member of Messrs. Andrews, Kurth, Campbell & Jones of Houston, Texas.

The nine boxes of papers referred to by Mr. Gray are covered by rulings of the Special Master of March 22, 1962 that Toolco need not produce such documents. (Tillinghast Tr. pp. 3710-3715) To my knowledge those rulings were never altered or modified in any respect. However, should

Letter of Mr. Davis to Judge Metzner

the Court or Special Master so desire, I am prepared to arrange immediately for the shipment of those nine boxes to the Special Master so that he may satisfy himself as to the propriety and soundness of the March 22, 1962 rulings.

I respectfully renew my request for additional time so as to give me an opportunity to address myself in opposition to the ruling of the Special Master of January 22, 1963 which, in effect, would require Toolco to examine voluminous files which have already been examined, and from which full production has already been made pursuant to earlier orders, for the purpose of locating and producing additional documents, which I submit, have no bearing on any of the issues of the case to the extent that those issues are presently identified and, more particularly, in view of the pending motion to dismiss.

I and my staff have been working more than 16 hours a day 7 days a week since January 19, 1963 in an effort to prepare our papers on the motion to dismiss. In view of the number of unanticipated time-consuming matters which have arisen since that date with respect to this litigation, I respectfully request a reasonable extension of time for the submission to Your Honor of a brief in support of the motion to dismiss. In my opinion, I do not now have enough time within which to present an adequate analysis of the issues involved, particularly in the light of the statements made by Your Honor on the record, in conference, and in the January 19 order to the effect that you had a preconceived notion that the motion is premature, and that in your view it appears to be another attempt to postpone the deposition of Mr. Hughes. I understand that Your Honor wishes to consider the probable merit of said motion prior

Letter of Mr. Davis to Judge Metzner

to February 11. However, for reasons which I indicated on the record yesterday, I do not believe that the plaintiff and the additional defendants have any proper interest in insisting upon February 11 as the date on which the deposition of Mr. Hughes is to commence.

I would appreciate hearing from Your Honor with respect to the above.

Respectfully,

/s/ CHESTER C. DAVIS
Chester C. Davis

(Encl.)

cc: J. Lee Rankin, Esq.

All Counsel

(With enclosure)

Letter from Chester C. Davis to Special Master Rankin,
February 4, 1963

[Doc. 458]

[LETTERHEAD OF CHESTER C. DAVIS, NEW YORK 5, N. Y.]

February 4, 1963

C O P Y

Re: *TWA vs. Hughes Tool Company, et al.*

J. Lee Rankin, Esq.
36 West 44th Street
New York 36, New York

Dear Mr. Rankin:

Referring to the order of Judge Metzner dated February 1, 1963 and our telephone conversation relating thereto, this is to confirm the following:

Friday evening, February 1, 1963, I requested Messrs. Andrews, Kurth, Campbell & Jones to forward to me immediately the nine boxes containing work papers which Toolco claims are not producible under your rulings and orders of the Court. The boxes have left Houston and as soon as I receive them, I will advise you promptly so that you may examine each document and rule thereon.

As I explained to you in our telephone conversation, Toolco is taking the action indicated above without prejudice to its position that at this time it may not be properly subjected to further discovery proceedings by plaintiff or the additional defendants. Rather than submit to fur-

Letter of Mr. Davis to Special Master Rankin

ther discovery on the record to date, Toolco reserves the right, if it becomes necessary to do so, to elect not to defend on the merits.

It is, of course, the expectation of Toolco that the disposition of its pending motion to dismiss will obviate the necessity of pursuing the matter further. In addition, in connection with the claims being asserted by Toolco against the additional defendants, you are referred to the motion of the additional defendants, returnable February 18, for an order dismissing said claims with prejudice, and to the letter of Toolco to Judge Metzner dated February 1, 1963.

Sincerely,

/s/ CHESTER C. DAVIS
Chester C. Davis

cc: All Counsel

Letter from John F. Sonnett to Chester C. Davis,
February 5, 1963

[Doc. 459]

[LETTERHEAD OF CAHILL, GORDON, REINDEL & OHL]

February 5, 1963

Re: *TWA v. Howard R. Hughes, et al.*

Dear Mr. Davis:

Reference is made to the provisions of the order of Judge Metzner dated February 1, 1963 which required among other things the day-to-day production of documents which were the subject of that order. None has been supplied to date.

We hereby request that you produce to us no later than 5:00 P.M. tomorrow for inspection and copying the 1961 and 1962 tax returns and financial statements of the Hughes Tool Company which have been ordered produced as described in subparagraphs (v) and (w) of the Special Master's opinion dated January 22, 1963.

Very truly yours,

Chester C. Davis, Esq.

120 Broadway

New York 5, New York

cc: Hon. Charles M. Metzner,
United States District Judge

Hon. J. Lee Rankin,
Special Master

All Counsel

IFS:MHC:pw

Toolco's Notice of Motion, February 6, 1963

[Doc. 170]

[CAPTION]

61 Civ. 2324

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed "Complaint of Hughes Tool Company and Request for Investigation" which was filed with the Civil Aeronautics Board today and upon all proceedings herein, the undersigned will move before Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, at such place as shall be fixed by him, on February 8, 1963, at 10:00 o'clock in the forenoon or at such other time as shall be fixed by the Court, for an order (1) that all further proceedings with respect to the counterclaims of Hughes Tool Company herein be stayed pending the entering of a final order by the Civil Aeronautics Board with respect to said "Complaint of Hughes Tool Company and Request for Investigation" and (2) for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.,
February 6, 1963.

Yours, etc.,

CHESTER C. DAVIS, Esq.
Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.

[To All Attorneys of Record]

Affidavit of Nazeeh S. Habashy, February 6, 1963

[3828]

[CAPTION]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

NAZEEH S. HABASHY, being duly sworn, deposes and says:

1. I am a law clerk employed by Cahill, Gordon, Reindel & Ohl, counsel for Trans World Airlines, Inc. ("TWA"), who has been specially cleared to handle confidential documents in the above-mentioned action.

2. On Wednesday, February 6, at 4:45 PM, I went to the offices of Chester C. Davis, counsel for the Hughes Tool Company ("Toolco"), and requested the production for inspection and copying of the 1961 and 1962 tax returns and financial statements of Toolco which have been ordered produced as described in subparagraphs (v) and (w) of the Special Master's Opinion of January 22, 1963.

[3829] 3. Counsel for Toolco refused to comply with this request.

(Sworn to by Nazeeh S. Habashy on February 6, 1963.)

[24842]

Pretrial Hearing, February 6, 1963

[CAPTION]

BEFORE:

HON. CHARLES M. METZNER

District Judge

[APPEARANCES:]

* * *

[24843] The Court: Before we commence arguing on motions, does anybody have a copy of the CAB order of December 29, 1960? That was not public, as far as I could find.

Mr. Davis: We could have it before the close of the argument.

The Court: Secondly, Mr. Sonnett, your brief, on page 40 you refer to intermediate orders of the CAB in this matter. Do you have copies of those?

Mr. Sonnett: I do not, your Honor, have them with me but I can get them readily, I think.

The Court: Would they indicate what the Board was asked to do aside from just a three or four-line alternate finding?

Mr. Sonnett: I can't answer that question until I have another look at that.

The Court: All right.

[24844] Mr. Davis, you may proceed.

Mr. Davis: May it please the Court, I would like to say preliminarily that I put my energies in the paper that

Pretrial Hearing, February 6, 1963

we prepared for submission to the Court and I am a little hoarse and hard of hearing today.

I would like, if I may, to reserve as much of the time that the Court would be inclined to allow me to reply to whatever argument counsel for TWA may present, because I believe that our position is adequately set forth in our memorandum and reply memorandum.

In that connection, your Honor, I am not personally aware of when that reply memorandum was in fact delivered to your Honor's chambers.

The Court: Before lunch.

Mr. Davis: May I assume that you are familiar with the contents of that memorandum?

The Court: It was read in detail. Luckily I did not have to hold court this afternoon because I had to review some 3500 material and grand jury minutes for the grand jury tomorrow morning. I spent all afternoon on your reply brief.

Mr. Davis: Then apart from answering [24845] whatever questions I may be able to answer, I can state my position very briefly.

I want to emphasize first of all that we are not bringing on the motion for summary judgment under Rule 56. We have withdrawn that motion for the reasons stated in our memorandum. I can expand those reasons, if they would be a matter of interest.

The Court: No, I don't think it is necessary. I disagree with the reason you give or the indication you are compelled to withdraw your motion.

Mr. Davis: Then I would like to emphasize that so far as the motion we are bringing on is concerned, we are relying solely on the allegations of the complaint; we are not going outside of it.

Pretrial Hearing, February 6, 1963

In the introductory statement of our memorandum in connection with the explanation I attempted to set forth reasons why we wanted to withdraw our motion for summary judgment. I did refer to the testimony of Mr. Tillinghast and other officers, and the comment of the special master with respect to that testimony but only for the purpose of explaining the [24846] posture that the Tool Company found itself in.

The Court: I think you have a problem we can overcome simply. I am going to decide this as a motion for judgment on the pleadings in so far as that particular claim of yours is concerned.

You are in a procedural dilemma. You are withdrawing the motion for summary judgment, and yet you have gone outside the face of the complaint, and necessarily so, because the face of the complaint does not mention the orders and exemptions which you rely on as your third affirmative defense. Consequently since you have answered and raised that issue by your third affirmative defense I will consider this as a motion for judgment on the pleadings to get over whatever procedural hurdle you would have in arriving at your first determination for the first grounds of dismissal.

Mr. Davis: May I state in that connection——

The Court: Under the Putnam case the complaint would withstand a motion to dismiss under 12(b)(6). We will get to the merits of your ground without being held up by any procedural problem.

[24847] Mr. Davis: May I merely state then that my position with respect to referring to the CAB orders, I did not refer to all of the many CAB orders which approve particular transactions between the Tool Company and

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TWA because my position is that it is immaterial whether they were in fact in violation. If not, we were in violation of CAB orders; and if they were, we were not.

I refer to the orders issued by CAB under 408, because to my mind those are quasi-judicial decisions which under the law, as I understand it as reflected by the decision of the Supreme Court in *Panagra*, it is a matter which needs to be considered as a matter of law, the legal effect of those particular orders of the CAB.

Having made those observations, your Honor, I believe that I can only address myself to answering questions, answering the position taken by TWA. I can anticipate to some extent, I think, in my reply memorandum I have adequately made clear that there is no basis for the distinction between the conduct alleged in 1961 and that alleged prior to 1961, so far as the contention is that such conduct was in violation of the antitrust laws. I can [24848] expand on that, although my reply memorandum, it seems to me, adequately takes care of that contention.

I think I would just be taking up the Court's time unnecessarily if I repeated what I set forth in my memorandum, reply memorandum.

The Court: Mr. Sonnett.

Mr. Sonnett: TWA submits on the papers before your Honor, unless there is some question you have of me.

The Court: I have no question.

I received Mr. Davis' reply at noon last Friday. I received your brief at noon last Saturday, and I worked Friday night, Saturday, Sunday, Monday night and last night, and I called for this hearing on the chance that maybe Mr. Davis could persuade me that the conclusion I had reached on reading the briefs and studying them and

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checking the law was wrong. Mr. Davis wants me to rely on his papers. Consequently I will deny the motion to dismiss the complaint. This is the order of the Court and a formal opinion will follow in the next day or two.

Mr. Davis: Your Honor, may I respectfully [24849] request then that in your opinion you certify the matter, 1292, so that I may obtain a discretionary review by the Court of Appeals?

The Court: The application is denied.

Mr. Davis: May I respectfully request your Honor to stay all further discovery proceedings by the plaintiff until I have had an opportunity to seek a discretionary review by the Court of Appeals?

The Court: Are you referring to the production of the documents under my pretrial order of January 19th or the tax papers covered by the orders of February 1st, or the deposition of Mr. Hughes, now scheduled for February 11th?

Mr. Davis: I was referring to all further pretrial proceedings, your Honor, because of the unquestioned burden and expense that the Tool Company will withstand if we are to continue to litigate with a view toward having a trial prior to our effort to obtain a review as to whether the determination made today on our motion to dismiss is not upheld.

It seems to me it is difficult, although I would be willing to cooperate if it would be helpful in any way, to separate how far to go and [24850] where to stop.

The desire of the Tool Company is to seek an early and expeditious disposition of this litigation, particularly since it is bearing 78 per cent of the cost of this prosecution. Therefore it would be extremely burdensome, assuming

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that the Court of Appeals will review the basis for our motion to dismiss, upon the Tool Company to be incurring those very substantial expenses pending a review of that question by the Court of Appeals.

It seems to me, your Honor, that there is at least a very substantial question raised by the decision of the Supreme Court in the Panagra case as to whether or not this court should entertain jurisdiction of the questions raised by this complaint.

Granted that this decision in the Panagra case in some respects, as the dissenting opinion indicates, digressed from a prior determination of the Supreme Court and therefore to that extent may be regarded as a new and important question, but I find it difficult to conclude that the Court should not consider the fact that there is a very serious question involved, a question of law.

[34851] The Court: I will tell you what I will do. I will grant your application to the extent of staying all further discovery or deposition proceedings until 5 o'clock Friday. That will give you two days to make whatever application you wish to make to the Court of Appeals for a stay.

Mr. Davis: All right, your Honor.

The Court: Today is Wednesday, and you have tomorrow and Friday to draw your papers up and go to the Court of Appeals and ask for a stay. My stay will expire at 5 o'clock Friday, February 8th.

I have been bombarded with briefs, memoranda, motion papers and letters, and I have difficulty keeping abreast of them all. Let me see if I can find what I am looking for.

Mr. Davis: Is your Honor referring to this notice of motion that we made?

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The Court: I am referring to a letter that you wrote to Judge Hall.

Mr. Davis: I wrote two. One was in response to a letter from Mr. Rankin to Judge Hall.

The Court: The earlier one you sent to Judge Hall without sending copies to the special [24852] master, who is counsel to the Court.

Mr. Davis: I received information that there had been communications with Judge Hall of which I did not receive a copy. I did not know what they were. The only information I received, I think, was at the time Mr. Sonnett filed with your Honor a memorandum indicating some representative had communicated with Judge Hall.

I never received a copy of any communication by anyone contacting Judge Hall until I received a copy of a letter by Mr. Rankin. Mr. Rankin has indicated that he would contact Judge Hall, and I was waiting for him to do so in order to address myself to that question. Then, as I recall it, I received a copy of a communication by Mr. Sonnett to your Honor indicating that someone in California had contacted Judge Hall and the United States marshal out there. That is what, as I recall, produced my first letter. Shortly thereafter, as I recall it, I received a copy of a letter from Mr. Rankin to Judge Hall and I addressed myself to that letter.

The Court: I can't find it offhand with all these papers that have come in in the last [24853] two weeks.

What I was looking for that letter for was an indication that you had made in that letter, as I recall it, that until the Court had ruled upon your motion to dismiss you saw no reason why arrangements should not be made—or why ar-

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rangements should be made for the deposition of Mr. Hughes on February 11th.

In your letter of February 4th to the special master, a copy of which was furnished to me on February 5th by Mr. Hupper, of counsel to the insurance companies, the additional defendants in this case, you stated as follows:

"As I explained to you in our telephone conversation, Toolco is taking the action indicated above without prejudice to its position that at this time it may not be properly subjected to further discovery proceedings by plaintiff or the additional defendants. Rather than submit to further discovery on the record to date Toolco reserves the right, if it becomes necessary to do so, to elect not to defend on the merits.

"It is, of course, the expectation of Toolco [24854] that the disposition of its pending motion to dismiss will obviate the necessity of pursuing the matter further.

"In addition, in connection with the claims being asserted by Toolco against the additional defendants, you are referred to the motion of the additional defendants, returnable February 18, for an order dismissing said claims with prejudice and to the letter of Toolco to Judge Metzner and dated February 1, 1963."

My reference to your letter to Judge Hall and to this communication is in the light of the ruling which I now have made regarding the sufficiency of a complaint and its validity against the attack you have made upon it.

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I think, if I read the implications of your letter correctly, that if the Court's determination is final you would not proceed with the deposition in California on February 11th. If that is true, I think that it would be better for all people concerned, considering all the time and effort necessary to move the proceedings to Los Angeles, to indicate that as quickly as possible, so that arrangements which are now in progress are not carried forward at [24855] great expense to yourself, to the plaintiff, to the additional defendants, and the inconvenience to the court in Los Angeles which, as I understand it, is proceeding to make the necessary arrangements for this hearing to go forward on February 11th. This is a suggestion which I am making.

Mr. Davis: Your Honor, I am quite aware of that. I do intend and hope, perhaps tomorrow, that I will be in a position of advising all concerned, and particularly Mr. Rankin, to whom I have already pointed out the possibility, and I did expect that I would get some guidance as to what I will have to do next based upon today's ruling or observation that your Honor might make.

I will so advise the parties and try to work out an appropriate procedure so as to put the position of the Tool Company on the record.

Your Honor, I am wondering if it would be appropriate for me to make another suggestion or request, if I may.

In connection with the denial of our motion to dismiss and the time which I now have to apply to the Court of Appeals for whatever relief I can have, and more particularly in view of what I [24856] understand by your Honor's ruling denying the certification under 1292—I also understood that the reasons or the opinion of the Court in reaching that conclusion will not be available to me for

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another day or two—I was wondering what I would have to present to the Court of Appeals as the basis of the Court's ruling on the one hand and my position on the other.

The Court: It is complicated. I must formalize my ruling and give you the reasons for it. But the two grounds which you are urging are fairly simple grounds.

I think you have set forth in your brief and in your reply brief—and I must say better in your reply brief than in your original brief—your position. I would assume that if you do not have a copy of my opinion by noon on Friday—and I will make every effort to see that you get it; I will have my secretary down tonight and tomorrow night to get it out—even absent the formal reasons, the answer is I do not agree with you.

Mr. Davis: I know I can say that to the Court of Appeals, but in order—

The Court: I will make every effort to [24857] have it before you—it is not going to be too long and will probably run about 15 pages—but I think if you were to go to the Court of Appeals and, if it is necessary, say to them, "Judge Metzner disagreed with this position that I took on my briefs," it would suffice, because all I had before me were the briefs. I ruled upon the briefs and the complaint.

Mr. Davis: That is correct, your Honor. But obviously, and particularly in view of your ruling refusing certification of 1292, I was thinking that the Court of Appeals might like to know what the legal issue—

The Court: I think I flatly can say that I disagree with your interpretation of 408 and 414 as applicable to the specific orders involved here upon which you rely, the orders of 1944 and 1950. The scope of the order goes to the fact of acquisition, as I see it. It does not give you a license to engage in subsequent acts which may amount to restraint

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of trade or attempts to monopolize, and I do not think the words in 414 are necessary to carry out what was authorized or approved by the Board encompassing such activity. That in [24858] brief is what the 15 pages are going to say.

Mr. Davis: Do I also understand that it is the conclusion of the Court that——

The Court: Let us leave it this way. You will have an opinion signed by 10 o'clock Friday morning.

Mr. Davis: Thank you, your Honor. I would prefer a stay for a couple of more days.

The Court: I can go on, but you may say what I said from the bench is not what I put in the opinion. I will go over the draft and polish it up.

Mr. Davis: I was really hoping for a little more time beyond Friday.

The Court: I am afraid not.

Mr. Hupper: Your Honor, if I may indulge the Court for a minute, my name is John Hupper and I appear here in the absence of Mr. Bromley, who unavoidably is out West today. I won't say exactly where.

I speak in connection with a paper that was served upon us around noon today involving an application for a stay of any further proceedings in this case on behalf of the additional defendants [24859] on the counterclaim by reason of a so-called complaint which has been filed today with the CAB. If I may say so, and I think I speak for all the additional defendants, our plans for California are well advanced. Many of our files are there and some of our people.

We believe it is very important to have a quick disposition of this application for a stay, which, as we view it, is simply another diversionary effort in some manner or other to avoid the deposition of Mr. Hughes.

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Mr. Davis, in his notice, states that he is bringing on this motion on February 8th, or such other time as the Court may direct. We respectfully urge your Honor to hear Mr. Davis on this motion now so that we will know where we stand at the earliest possible moment.

The Court: I can listen to him. Does that mean I have to decide it too?

Mr. Hupper: We believe this motion to be just a——

The Court: I have read the complaint which Mr. Davis served upon you. He filed a copy with the Court. I read it this afternoon.

[24860] Would you say, Mr. Davis, in view of the determination of your motion on the complaint, that this motion which you served today, returnable at 4 o'clock Friday, need not be heard at 4 o'clock on Friday?

Mr. Davis: Need not be heard, your Honor?

Well, your Honor, it may very well be that the reasoning that the Court will give in its opinion will cover this also. However, based only upon what your Honor has indicated today, which, if I understand the remarks which obviously——

The Court: Which you are not going to hold against me.

Mr. Davis: Which I won't hold against anyone—indicate the views of the Court as to whether or not the orders obtained from the CAB covered the course of conduct alleged in the complaint.

We have, as your Honor is aware, a second independent ground on which we claim that this primary jurisdiction is in CAB based upon a Supreme Court decision in Panagra, and that is whether the CAB had the the power to approve.

To the extent to which your Honor, in [24861] denying my motion to dismiss, addressed himself also to that ques-

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tion—and I recognize that inferentially, but I would like to have it for the record—you would be denying the basis upon which I claim that I would be precluded from pursuing the counterclaim in this court on the ground——

The Court: You wrote to me, as I recall, several days ago—and I think I have those papers right here; your letter of February 1st, that was last Friday—in which you gave me the impression that the reason you were going to move before the CAB and for a stay in this court with regard to the counterclaim was that, if the motion to dismiss had been granted, there would still be outstanding the counterclaims upon which the plaintiff and the additional defendants could proceed with depositions and, since you felt that those counterclaims dealt with the primary jurisdiction of the Board, if they were the only things left in the lawsuit at this time you were then going to move, with regard to the counterclaims, to remove them from the case and remove them as a possible basis for the deposition of Mr. Hughes on February 11th.

In view of the fact, however, that I [24862] have found that your motion to dismiss the complaint should be denied, I was wondering whether the reason for this last procedural step existed any longer.

Mr. Davis: It still exists to this extent. It is quite true that in my February 1st letter I was addressing myself to the situation which would exist if the complaint was dismissed and we had the counterclaims and what the basis of jurisdiction of the court was on the counterclaims absent the existence of the complaint.

Quite frankly I do not know the answer and I have not had an opportunity to research the question as to what is procedurally the question if you assume a complaint as being

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validly before the Court and a counterclaim as to which primary jurisdiction rests in the Board.

Assume it is a compulsory counterclaim or not a compulsory one and then the question——

The Court: You think they are compulsory counterclaims, don't you?

Mr. Davis: Certainly some of them are.

The Court: Miss Lea argued that a year or so ago.

Mr. Davis: They are certainly com- [24863] pulsory permissive.

My problem, and the reason for the answer I am now giving you as to whether or not there is any question left, is that I believe there is a question left, although to be sure to the extent to which the Court is predicating denial of our motion to dismiss merely on the fact that 408 does not grant exemption of 414, that has nothing to do with the counterclaim because we do not claim that there were any 408 orders granting exemption of 414.

We do recognize, and our position has to be consistent, and is, we read the Panagra case, there is primary jurisdiction of CAB if the course of conduct alleged is one that the CAB could approve. Whether it did or not is besides the point. Whether it could approve under 408, that is the point.

Whatever the Court may do here, we are proceeding before the CAB for a determination by the CAB as to whether or not the course of conduct there involved—by "their involved" I mean the counterclaim—is something that they will find to be either in the public interest or not in the public interest.

Our view of the case, that is, the pre- [24864] requisite before we could recover anything in our counterclaim, if I

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could rely on the ultimate conclusion of the Court that that is not so—and I have not even heard it today, but I assume your Honor will cover that aspect of the matter in your opinion—as I say, it may very well be that, as far as a need of argument or an extended argument or briefing on this question, it will be unnecessary in the light of whatever opinion the Court hands down in connection with the ruling made today, but so far as Toolco is concerned we most sincerely believe that the only proper interpretation is the Supreme Court direction in the Panagra case, because that was in fact the question before the court in the Panagra case, squarely before the court.

There was a situation where something had not been submitted to the CAB for approval. The CAB unquestionably had not issued any orders and the CAB had to act under 411, which was not involved in 414. Yet the Supreme Court dismissed the complaint because you must go to CAB first and let the CAB decide.

Presumably if the CAB—and I am talking about the Panagra situation now—were to [24865] decide that the manner in which Pan American and Grace were exercising control over Panagra was not in the public interest and they refused to bless it or sanction it or however it is done, then presumably whoever had an interest in the situation could resume litigation in the court on the basis of violation of the antitrust laws.

That, of course, was the second independent ground upon which we predicated our motion to dismiss. We were not relying exclusively on the existence of 408 orders.

The Court: Obviously.

Mr. Davis: To answer the suggestion of your Honor, we do—of course, if the complaint is to continue to be litigated, we are not asking to be stayed in our counterclaims,

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and that is something I will have to think through between now and Friday.

As far as our pursuing our procedure before the CAB, we do not think we have any choice on that.

The Court: Well, I don't know what I can do about your motion. You have noticed it at least for Friday at 4 o'clock. I am in the [24866] ninth week of this criminal trial so I am tied up from 10 until 5 every day, except this afternoon, when we had this lucky break.

If you want your decision out on your motion to dismiss to show the Court of Appeals what I said, it is physically impossible to take this up.

Mr. Davis: I appreciate that.

May I suggest that the matter be left in abeyance, but tomorrow I will make an effort to also make a decision and take whatever action I am advised to take—either tomorrow or Friday—but I will advise the parties with respect to this Los Angeles date so that——

The Court: May I take your motion and hold it in abeyance and have argument on it?

Mr. Davis: Any time convenient to your Honor.

The Court: Mr. Hupper is not satisfied.

Mr. Hupper: Isn't it perfectly plain what Mr. Davis is trying to do here? He is going to have a decision some time Friday from the Court [24867] of Appeals on whether or not there is any merit to his attempt to get appellate review. At that point he will have something else which he can wave in front of you or some other court which he will use as a basis for arguing that the deposition of Hughes should not go ahead on Monday. There are still unresolved questions——

The Court: Will you agree, Mr. Hupper, if the Court of Appeals stays my determination, that you are not going to run out to Los Angeles Monday?

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Mr. Hupper: I would not agree to that as a matter of law for this reason: The charges made against us in this CAB proceeding are quite entirely different than the charges made by the TWA people against the Tool Company completely. We have an additional question here which is a matter of discretion.

We have, for over a year or almost a year now, been engaged in this case, brought in by Toolco against our will, the Tool Company asserting claims of over \$330 million against us and alleging that this court had jurisdiction over those counterclaims, and we have——

The Court: Mr. Davis said Panagra did [24867-A] not come down until——

Mr. Hupper: That is not applicable here at all. That involved Section 411.

The Court: I read it four times. Don't tell me that.

Mr. Hupper: It has not the slightest thing to do with this. We are not air carriers and we are not engaged in air transportation. It has nothing to do with this case. There is not a possible basis for it.

What Mr. Davis is doing here is using this motion as a basis after a year of dragging us down the garden path and making us spend hundreds of thousands as a last ditch attempt to stave off the deposition of Hughes.

We have a right to examine Mr. Hughes independently of whatever his position in that complaint is. As a matter of discretion we feel you ought to permit us to go forward on that examination if only for the fact that it would enable us perhaps to adduce facts which would be helpful to you in determining whether or not you have jurisdiction over the subject matter.

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The Court: Mr. Davis, do you intend to [24868] pursue your counterclaims?

Mr. Davis: Not until we have a determination from the CAB.

The Court: In other words, you want to stay any proceedings regarding the counterclaims in this court until the CAB has spoken first?

Mr. Davis: That is our understanding of what the Supreme Court has held.

Of course, if I am told in some final manner that I am wrong in that regard, I want to be able to resume. That is our understanding of the Panagra case. It is a basis for our motion to dismiss. It will be the basis on which we will try to obtain a review at this time and therefore I don't understand why a defendant is so anxious to be prosecuted if I am willing to stay my claims against the additional defendants. So far as the facts in their petition, they are set forth in these proceedings before the CAB.

I fail to understand every time being accused of following some procedure for some improper motive. What is the motive of the additional defendants in feeling that they want to examine Mr. Hughes to defend themselves and I am permitted to [24869] keep their claim in abeyance until the CAB can make a ruling? Perhaps Mr. Hupper can explain it more clearly.

The Court: We will have to take Mr. Stewart first. This is his chance to be not the last man.

Mr. Stewart: Mr. Davis, as far as the additional defendant Dillon Read is concerned, for the first time in this case, after having been in it for a year, we have the opportunity presumably to prove that the counterclaims which are brought against us are absolutely baseless. It

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is particularly compelling because this co-called complaint which Mr. Davis has brought before the CAB is absolutely meaningless as far as we are concerned.

Dillon Read is not an air carrier; it is not engaged in a phase of aeronautics, nor does he claim that we are so engaged. Nothing that the CAB says or does not say can affect us in any way.

We have no interlocking directorates and nobody in Dillon Read is on the board of Pan American or TWA or the Metropolitan or the Equitable. There is no possible way in which we can come into Section 411, which deals with unfair competition among air [24870] carriers. Nothing that the CAB decides in this complaint can affect us in any way.

For the first time in this litigation we have come close to being able to prove there is nothing to the charges in his counterclaim, and I suggest it is absurd for him to want to stay on the counterclaims he brought, bringing us into this action, at this particular juncture. I ask your Honor to deny it from the bench.

The Court: There are other problems in the CAB proceeding, are there not, Mr. Davis? You allege that Pan American World Airways and Mr. Juan Trippe were also co-conspirators during this whole time with the additional defendants named in your counterclaim.

Mr. Davis: There is no question, your Honor. Subsequent to the filing of our counterclaims I discovered additional facts which I am bringing to the attention of the CAB.

There is no question, however, that the course of conduct involved, which is a matter of concern, primary concern, to the CAB, is the same whether or not the addi-

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tional defendants are limited or expanded by one more or less. The question [24871] basically is whether or not the CAB—for all I know, although I don't believe so, the CAB may approve this interlocking relationship between Metropolitan and Pan American. That is where we get into the question of where I am disagreeing with your conclusions.

It is clear to me, as the Supreme Court said, we are in a peculiar situation if on the one hand the Court were to entertain whether or not a course of conduct was or was not in violation of the antitrust laws and then the CAB should turn around and approve it and specifically grant exemption under 414, even though they never did it before.

The Court: Is the issue of whether any of the parties named in the complaint before the CAB are engaged in a phase of aeronautics a question for the CAB or for the Court under the counterclaim?

Mr. Davis: We allege and claim that they are engaged in a phase of aeronautics. The CAB has any number of decisions as to what they claim is a phase of aeronautics. I believe it is a question for the CAB to determine, subject to judicial review by the Court of Appeals.

There is no question; the Act uses a [24872] phrase "a phase of aeronautics," and there again we come to the question as to how we construe the Supreme Court direction or mandate which said the Act must be construed broadly and must be intended to empower the Board to correct the evils inherent in whatever it deals with.

There is no question but by 409, interlocking directorate relationship, and there is no question under 408, the Congress intended that agency to control and regulate the relationship between a person engaged in "a phase of aeronau-

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tics" and an air carrier and transactions between them and what they do to each other.

You emasculate 408 if some independent such as the Court is going to define what a phase of aeronautics is or is not. There is no question of judicial review as to what the Board may determine. I don't have any question in my mind. I may be in the minority here today, but it is at least the primary jurisdiction, the expertise of the CAB, to determine in the first instance what they regard as a phase of aeronautics.

I know that throughout the years since the Act was passed a great many people have argued [24873] before the CAB that the kind of activities they were engaged in were not the manufacture of aircraft or parts of aircraft and therefore outside of the control of the CAB, and therefore they could do what they wanted to do, and CAB has rejected those arguments on a number of occasions and has developed CAB law as to what they claim constitutes a phase of aeronautics. That is unquestionably involved here.

Go back to reasons why I did what I have done and how things change. There is no question in my mind that the Panagra decision of the Supreme Court expanded what I was contending for prior to the Panagra decision.

If your Honor will recall I was accepting the decision of Judge Murphy in the Panagra case where he had excluded from the jurisdiction of the Court that area which had been covered by orders of the CAB, leaving to the CAB to interpret its own orders as to whether or not it did cover the conduct that was alleged.

The Court: He only went ahead, as I understand it, on the charge that Pan American had prevented Panagra from applying for additional routes [24874] from the Canal Zone to the United States.

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Mr. Davis: That's correct. Before Judge Murphy the contention—there were two aspects of the claim. One was that one which was predicated upon an agreement between Grace and Pan American entered into before the Civil Aeronautics Act was adopted and therefore protected by the grandfather concept, and there were alleged violations of the antitrust laws by reason of the fact that control had been exercised over the air carrier in the use of ticket offices and some other things which were subject to orders of the CAB.

In our earlier brief back in August of 1961, I think it was, I was arguing that Judge Murphy had recognized the primary jurisdiction of CAB, leaving to the CAB the interpretation of its own orders as to what it was approving or not approving, because the CAB had acted in that area but assumed jurisdiction in the area they had not acted and at that time believed it could not act, namely, this exercise of control over Panagra and how the routes were being divided.

The Supreme Court came down and said that even in the area in which the CAB had not acted [24875] and in fact an area which the CAB did not believe it could act, nonetheless it said, "We are going to construe the Act so broadly as to infer a power in CAB to do something about this kind of exercise of control," dismissed the complaint, and this was a matter that CAB should act in.

That does not mean necessarily there has not been a violation of antitrust laws and after the CAB has acted and has found or failed to find it is in the public interest, thereafter if someone violated the antitrust laws they will be subject to whatever remedies the antitrust laws provide.

It is our view of the matter that until that determination is made for the reason given by the Supreme Court, it

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would be odd indeed if a course of conduct which could be approved by CAB under 408 could run afoul of the anti-trust laws.

So our position was not—that is what I meant in my opening remarks—I was not relying as a matter of fact on what CAB had or had not obtained but only on a recognition that the authority might be in the CAB to act on it. Tomorrow they may say that the way you exercised control over it was in the public interest and we approve [24876] it. That would preclude the enforcement of antitrust violations and therefore we believe that should be determined first.

The Supreme Court said that if you are claiming damages, there is no question the CAB cannot grant you relief for damages, in that footnote in the court decision referring to the Hewitt decision; that in that situation you ought to get a determination of the violation of the law with the possibility you have a remedy of the antitrust laws and go to the court and collect your damages.

The Court: Mr. Hupper, I am sorry, I am not in a physical condition to comply with your request. I am going upstairs now to get this opinion out. I am on trial all day tomorrow. I may have to work on the opinion again tomorrow night. I hope not.

Mr. Hupper: May I express my hope, your Honor, that the argument is not set down on the motion for a stay so as to interfere with our examination of Mr. Hughes starting Monday.

The reason I say that is that we believe very firmly that we have an independent right to examine him quite apart from what happens to Mr. [24877] Sonnett. We intend to vindicate—

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The Court: What do you think of Mr. Davis' argument that I don't have jurisdiction on the counterclaim as opposed to the complaint?

Mr. Hupper: I am not sure I understand what his position is, but I do——

The Court: This is very simple. He is going to take you down to Washington.

Mr. Hupper: I think the very simple reference to these counterclaims will show you how completely different they are from the claims made in the complaint. The first counterclaim——

The Court: I know.

Mr. Hupper: The only reference that has anything to do with CAB is the second counterclaim. All the others are completely different. I want to join very wholeheartedly in what Mr. Stewart said about the time and expense that we have to go through in trying to get our first witness on the stand after we had to sit through the other deposition for a year. We want to proceed with this case and prove that there is absolutely no merit to these claims against us.

The Court: Well, all I have before [24878] me is a motion returnable on Friday for a stay of the discovery proceedings. I am telling you I can't hear you on Friday. It would be impossible. I will try some time tomorrow to read the complaint filed with the CAB with greater particularity than I remember it this afternoon and try to match them up.

Mr. Hupper: Do you suppose we could set it for the 18th, which is the return date for our motion to dismiss the counterclaim?

The Court: It is all right with me.

Mr. Hupper: That's all right with us.

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The Court: The 18th? That is a Monday? Certainly. Does that dispose of it?

Mr. Hupper: I guess it does. I wish we could have heard and disposed of it right away. I know your problems.

The Court: I don't see how I could possibly do it.

Mr. Hupper: There is a minor thing. You did stay, as far as the TWA people were concerned, all further discovery production until 5 o'clock tomorrow.

The Court: I will put in the additional [24879] defendants too.

Mr. Hupper: The situation is different, Judge——

The Court: Let us not argue with the stay. It extends to all the additional defendants.

Mr. Hupper: Thank you.

Mr. Sonnett: Thirty seconds, your Honor, by way of a report. I don't want to get mixed up with this other question except to say the so-called derivative counterclaim, counterclaim 3, by no legerdmain of Mr. Davis or anybody else can possibly have anything to do with the CAB, and on behalf of TWA I have a very definite interest in that counterclaim. While Mr. Davis is deciding what he means when he says they may elect in effect to cop a plea, he better realize there are derivative counterclaims asserted by him, and for him to stand up and say "We default" is not going, in the judgment of TWA, to dispose of this case, if that is the way he thinks he can dispose of it; it won't meet the problem.

The other thing is a report. I would like to file with the Court an affidavit by one of [24880] my associates and serve a copy on Mr. Davis because this relates to the additional contempt committed and fully ripened prior to 5 o'clock today arising out of their failure to comply in any

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respect with your order to make a day-to-day production of so-called tax documents.

Yesterday I wrote them and asked that they produce prior to 5 o'clock today, pursuant to your order, 1961 financial statements and tax returns, and the same for 1962, on the theory they could get those in five minutes. They have declined to do so. This affidavit is an affidavit that we asked for them at 5 today and they refused to do it.

The Court: All right. Thank you, gentlemen.

Affidavit of Bruce Bromley, February 15, 1963
[4871]

[CAPTION]

STATE OF NEW YORK, }
 COUNTY OF NEW YORK, } ss.:

BRUCE BROMLEY, being duly sworn, deposes and says:

I am a member of the firm of Cravath, Swaine & Moore, attorneys for The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr. and Harry C. Hagerty, additional defendants on the first five counterclaims herein. I make this affidavit in support of a motion by said additional defendants pursuant to Rules 37(b)(2), 37(d), 41(b) and 41(c) for an order dismissing the first five counter- [4872] claims herein with prejudice as to them by reason of the repeated deliberate refusals of defendant Hughes Tool Company (Toolco) to make discovery in accordance with the Rules of Civil Procedure and lawful orders of this Court. This affidavit is also submitted in support of an application for immediate entry of judgment dismissing such counterclaims pursuant to Rule 54(b) and for an express determination that there is no just reason for delay of the entry of such judgment.

BASIS FOR THE MOTION SUMMARIZED

Toolco has repeatedly refused to produce two major categories of highly relevant documents and has also refused to produce its managing agent for examination before trial by the additional defendants. On January 23, 1963, Toolco refused to produce certain allegedly privileged

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documents which it had been ordered to produce under Rule 34 on several occasions, most recently by an order of this Court dated January 19, 1963. On February 1, 1963, and on each day thereafter up to and including February 11, 1963, Toolco refused to produce certain so-called tax documents which it had been ordered to produce under Rule 34 by this Court on February 1, 1963. On February 8 and February 11, 1963, Toolco and Howard R. Hughes (Hughes), Toolco's managing agent, wilfully refused and failed to appear before the Special Master for examination before trial in accordance with several previous orders of this Court, the latest of which was dated January 19, 1963. Each of said refusals was intentionally made in direct contempt of a lawful order of this Court issued in accordance with the Rules of Civil [4873] Procedure and separately and together justifies dismissal with prejudice of the counterclaims herein.

**THE TREMENDOUS BURDEN IMPOSED ON THE ADDITIONAL
DEFENDANTS BY TOOLCO'S PREVIOUS PROSECUTION
OF THE COUNTERCLAIMS**

The counterclaims were filed and the action commenced as against the additional defendants on February 13, 1962. It thereupon became necessary for counsel immediately to begin day-by-day participation in the Toolco depositions already in progress, although we had not as yet had an opportunity to examine the facts sufficiently even to file a responsive pleading. Within days my clients were required to produce tens of thousands of pages of documents for production and copying by the Toolco attorneys. Within four weeks counsel for all parties were engaged in a full-scale discovery program which in the course of the next six

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months produced for inspection and copying well over a million pages of documents. During the rest of the year 1962, with intermittent interruptions, the attorneys for Toolco enjoyed the exclusive right of conducting deposition discovery before the Special Master, in all of which counsel for the additional defendants were required to attend and participate. At the same time that those depositions were going forward it was necessary for us to copy, organize, analyze and summarize the tremendous quantity of documents which had been produced in discovery proceedings by all parties. It was also necessary to prepare for the cross-examination of various witnesses undergoing direct examination by the Tool Company and, during the last several months, to prepare for the examination of Toolco by Mr. Hughes. During the last few weeks before February 8 it was necessary for us to set up a special office in Los Angeles and to transfer to it over [4874] 800 binders of documents and other material. Those steps were necessary because Toolco's counsel refused to "function" on the matter of the Hughes deposition.

In this office alone the manpower requirements for the foregoing activities have involved the services of at least a dozen lawyers, several of them on a full time basis and for others a major portion of their time, as well as the hiring of a whole battery of file clerks and the like. To my personal knowledge such activities have involved direct expense to my clients for legal fees and disbursements of several hundred thousands of dollars through the end of last year—to say nothing of the obvious tremendous inconvenience and disruption of their regular business activities.

It is in this context of the case, after the Tool Company has enjoyed exclusive deposition discovery rights for a year at great inconvenience and expense to my clients, that its

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peremptory and contemptuous refusal to afford us even preliminary discovery on obvious critical factual areas must be viewed.

This Court is familiar with the so-called "positions" of Toolco which have assertedly led to its refusal to comply with discovery orders. Such asserted "positions" of Toolco neither explain nor justify Toolco's contemptuous defiance in three major areas of the lawful orders of the Court, particularly in view of the record. Moreover, on the basis of our review of documentary and other information to date (more fully described in the affidavit of William C. Chanler), it is perfectly clear to me that the real reason for Toolco's refusal to make discovery is the certainty that such discovery would demonstrate that the counterclaims are merely a smokescreen designed to mask the reality of the depredations inflicted upon TWA for Toolco's own selfish purposes.

**[4875] TOOLCO'S REFUSAL TO PRODUCE THE
SO-CALLED PRIVILEGED DOCUMENTS**

On February 14, 1962, the above-named additional defendants moved pursuant to Rule 34 of the Rules of Civil Procedure for an order requiring Toolco to produce for said additional defendants certain categories of documents for inspection and copying. (A copy of that motion is attached hereto as Appendix F and made a part hereof). The Special Master granted that motion on February 16, 1962 (Tr. 1482-1512 of 2/16/62). On March 15, 1962, Toolco produced certain of those documents in New York City, Houston, Texas and Los Angeles, California.

However, a number of documents admittedly called for by that Rule 34 motion and the Special Master's order

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were withheld by Toolco under a claim that such documents were not subject to production because they were protected by the attorney-client privilege. Such documents were potentially of great significance to my clients' defense of the counterclaims because Toolco had for many years used its counsel as business agents and, indeed, the financing and voting trust agreements repeatedly referred to in the allegations of the counterclaims as having been forced upon Toolco as a result of my clients' alleged unlawful conduct were primarily negotiated on Toolco's behalf by its counsel. Accordingly, Toolco's claim of privilege was argued and briefed at great length before the Special Master. On April 17, 1962, the Special Master ruled that the privilege had been deliberately waived by Toolco through disclosure in several affidavits and in its pleadings and ordered such documents to be produced for the additional defendants (Tr. [4876] 4361-4391 of 4/17/62). That order of the Special Master was affirmed by this Court by order dated July 24, 1962. Thereafter, the same matter was reargued by Toolco before the Special Master on September 15, 1962. Again, the Special Master ordered the documents produced (Tr. 164-167 of 9/15/62). Again the Master's order was affirmed by the Court in its order dated January 10, 1963. In that order the Court directed that such documents be produced by 12 noon on January 14, 1963. At that time on January 14, we made specific demand on Toolco to produce those documents, but counsel for Toolco refused to make such production. It should be noted that the documents at the time of that demand were conveniently assembled in an envelope which counsel exhibited but refused to produce. (Attached hereto as Appendix A and made a part hereof is a transcript of the proceedings on January 14, 1963.)

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By the Court's order of January 19, 1963, Toolco was given until 12 noon on January 22, 1963 to produce the documents in question. At the Court's suggestion this date was by stipulation changed to 12 noon on January 23, 1963. Toolco attempted to obtain appellate review of the orders of January 10 and 19 and, particularly, sought a stay of that part of the orders requiring Toolco to produce the allegedly privileged documents pending such review. By stipulation we and other counsel consented to a stay of production until 5 P. M. on January 23, 1963, to enable Toolco to attempt to obtain a review and a further stay from the Court of Appeals for the Second Circuit. Such review was sought by way of notice of appeal under 28 U. S. C. § 1291 and by petition for a writ of mandamus. The appeal was dismissed on [4877] motion and the writ and stay were denied by the Court of Appeals on January 23, 1963. Accordingly, at 5 P. M. on January 23, 1963, we again demanded production of those documents and were again refused. (Attached hereto as Appendix B and made a part hereof is a copy of the transcript of the proceedings before the Special Master of January 23, 1963.)

**TOOLCO'S REFUSAL TO PRODUCE THE SO-CALLED
TAX DOCUMENTS**

As a result of our study of the documents produced by Toolco on March 15, 1962, we were able to ascertain the probable existence of certain other documentary information primarily relating to Toolco's tax returns and financial statements which would, in our view, have established a complete defense to the allegations of the counterclaims. By notice of motion dated January 9, 1963, we moved for the production of such documents for inspection and copy-

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ing. On January 22, 1963, the Special Master ordered Toolco to produce such documents. (The Special Master's opinion and order are annexed hereto as Appendix C and made a part hereof.) By order of February 1, 1963, this Court ordered Toolco to produce those documents on a day-to-day basis commencing on February 1, 1963, such production to be completed by February 11, 1963. As the affidavit of Donald I Strauber sworn to February 15, 1963 (attached hereto as Appendix D and made a part hereof) more fully shows, production of those documents in accordance with the Court's order was repeatedly demanded by letter and in person. Finally, on February 8, 1963, counsel for Toolco categorically refused to produce any of those documents and stated that he would not produce them [4878] (Tr. 58-9 of 2/8/63). Thus, those documents have also never been produced. Those documents also were readily available to counsel for Toolco. Indeed, I am informed that certain of the documents which Toolco was ordered to produce were exhibited to the Special Master on February 6, 1963.

**TOOLCO'S REFUSAL TO PRODUCE ITS MANAGING AGENT,
HOWARD R. HUGHES, FOR EXAMINATION**

By notices dated February 14, 1962, the day after this action was commenced against the additional defendants, we noticed the deposition of Toolco by Hughes, its managing agent, for February 21, 1962. (Copies of those notices are annexed hereto as Appendix E and made a part hereof. See also Tr. 1099 *et seq.* of 2/14/62 and Tr. 1108 *et seq.* of 2/15/62 where service of such notices was acknowledged by counsel for Toolco.) The prompt examination of Hughes was critical to our defense against the

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counterclaims, since not only was it Hughes' creature, Toolco, which had instigated the litigation against my clients, but it was the activities and eccentricities of Hughes which necessitated the financial and voting trust arrangements which were challenged by Toolco in its counterclaims.

Toolco has never challenged the right of the additional defendants to examine it through Hughes as managing agent, although it has consistently sought to postpone such examination to some undetermined future date.

On the strength of the chronological priority of the notices of February 14, 1962, the additional defendants moved for priority of discovery with respect to the allegations of the counterclaims. That motion was denied by the [4879] Special Master on February 16, 1962 (Tr. 1514-1515). The additional defendants appealed that ruling to this Court. By order of March 5, 1962, this Court granted the application of the additional defendants by modifying the deposition schedule in its previous order of February 7, 1962 (entered before institution of the counterclaims), to the following extent:

"Defendant Hughes Tool Company may continue the depositions scheduled, limited, however, to evidence which bears on plaintiff's claims against Hughes Tool Company. Since a Special Master is presiding over the depositions on a day-to-day basis, he will see to the application of this limitation. Upon completion of this phase of defendant's depositions, the plaintiff shall proceed with its depositions in the order provided in the pretrial order of February 7, 1962. *The additional defendants may participate in such depositions conducted by plaintiff, in furtherance of their own deposition proceedings,*

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or may separately schedule such depositions to follow upon the completion of plaintiff's depositions. At the conclusion of the deposition proceedings by the additional defendants, the defendant Hughes Tool Company may then resume and complete its deposition proceedings." (Emphasis added.)

Thereafter, on September 6, 1962, Chester C. Davis, counsel for Toolco, accepted service of a subpoena duces tecum for Hughes as a witness on behalf of plaintiff, TWA, returnable on September 24, 1962, at the United States District Court House in Los Angeles, California. On September 15, 1962, the additional defendants joined in an application by TWA to the Special Master to suspend the then existing examination schedule so that the deposition of Hughes could be taken commencing on September 24, 1962 (Tr. 63-75 of 9/15/62). The Special Master denied that application. However, at that time the Master said in part:

[4880] ". . . I am satisfied that there was authority for the service of the subpoena.

"That the subpoena is binding upon Mr. Hughes, and as I construe the subpoena, it is binding upon Mr. Hughes to appear on September 24, 1962, or in the alternative, as fixed by the Court at any other time that the Court lawfully orders Mr. Hughes to appear in the courthouse at Los Angeles.

"I feel that there is such a close connection between Mr. Hughes, as evidenced by some of the documents that I have seen, and the fact that he is the sole owner of the Hughes Tool Company, that the

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Hughes Tool Company is responsible for Mr. Hughes with regard to this subpoena . . ." (Tr. 98.)

That order of the Special Master was appealed and on September 21, 1962, this Court issued an order affirming the Special Master and adjourning the date of the Hughes deposition to October 29, 1962. The Court went on to say:

"However, in connection with this denial the Special Master directed Chester C. Davis to write to Howard R. Hughes and inform him that the Special Master considered that the subpoena is binding upon Mr. Hughes and that he is subject to appear pursuant to that subpoena on September 24th, 1962 or at any other date fixed by the court. The Special Master stated for reasons set forth in the record that unless Howard R. Hughes communicated with him by today, Friday, September 21st, 1962 he would consider that Mr. Hughes has acquiesced in this interpretation and that if Mr. Hughes subsequently either attacked the validity of the subpoena on September 24th, 1962, or at any future time that the court might direct for the taking of the deposition of Mr. Hughes pursuant to that subpoena, he, the Special Master, would consider the imposition of sanctions upon the Tool Company, and that he would entertain a motion to strike the answer of the Tool Company and enter judgment against it.

"Without passing upon the power of the Special Master to grant the entry of such judgment, the court adopts the interpretation and conditions expressed by the Special Master. Any determination

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by the Special Master on the application for a default judgment would, of course, be reviewable upon appeal to the court.

[4881] "On the hearing of this appeal the court inquired of Chester C. Davis as to whether he had followed the directions of the Special Master. Mr. Davis advised the court that he had written to Howard R. Hughes on Monday, September 17th, 1962, and enclosed the pages of the transcript of the hearing before the Special Master on September 15th, 1962 which contained the views of the Special Master. Howard R. Hughes has neither communicated with the Special Master nor the court as of 5:30 p.m. today, which is the end of the business day. Therefore, I find that Mr. Hughes has acquiesced in the interpretation and conditions expressed by the Special Master."

On February 8, 1963, counsel for Toolco stated with respect to the above rulings of the Special Master "... the Tool Company did not seek a review of those rulings of the special master by the Court and accepted in effect the responsibility placed upon it by that ruling." (Tr. 9 of 2/8/63).

On October 25, 1962, Toolco sought to adjourn the date for the examination of Hughes beyond October 29, 1962. We opposed that adjournment and asked that a firm date be set for our examination of Hughes (Tr. 48-50 of 10/25/62). The Special Master granted Toolco's application for adjournment, but set February 11, 1963, as a firm date for the Hughes examination (Tr. 53-63 of 10/25/62). At that time the Special Master fixed ten days from that

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date as the time for any party to appeal from the order setting the Hughes deposition for February 11, 1963 (Tr. 72 of 10/25/62). Toolco did not appeal.

On December 11, 1962, Toolco brought on before the Special Master a motion to interpose the depositions of A. L. Wadsworth and Ben-Fleming Sessel before the deposition of Hughes. On December 28, 1962, the Special Master rejected that maneuver by Toolco, stating "I am now denying the [4882] application and motion of the Tool Company to depose Mr. Sessel and the Irving Trust Company by Mr. Sessel and Mr. Wadsworth and Dillon, Read & Company, Inc. at any time prior to taking of the deposition of Howard R. Hughes, which is to begin on February 11, 1963." (Tr. 11 of 12/28/62). At the same time the Master referred to his order of October 25, 1962, to clarify it so "that there may be no valid basis for misunderstanding it". (Tr. 8). Toolco then appealed the Master's decision to this Court.

In its order of January 10, 1963, this Court, among other things, affirmed the Master's ruling with respect to the Sessel and Wadsworth depositions and concluded (P. 3) that "the deposition of Howard R. Hughes by the plaintiff and the additional defendants should now go forward". Following the entry of that order, Toolco undertook a variety of stratagems transparently designed further to postpone the date for the Hughes examination, *e.g.*, Toolco's motion to dismiss the complaint; Toolco's "appeal" to the Second Circuit and its petition for a writ of mandamus; and Toolco's motion to stay prosecution of the counterclaims on the basis of its hurried commencement of a proceeding before the Civil Aeronautics Board in order, as this Court noted, "to see if what we claim is

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wrong is really alright" (Tr. 27 of 2/8/63). All such diversionary efforts were unavailing. Finally, on February 8, 1963, counsel for Toolco, although accepting on behalf of Toolco the complete responsibility for producing Hughes in response to the notices of the additional defendants and the subpoena of TWA, refused to produce Hughes for either purpose (Tr. 1-63 of 2/8/63).

[4883] CONCLUSION

It is submitted that each separate refusal of Toolco to make discovery, in defiance of the orders of this Court, is independently more than sufficient justification for dismissal of the first five counterclaims with prejudice. It is also submitted that there is no just reason for delay in the entry of such a final judgment.

(Sworn to by Bruce Bromley on February 15, 1963.)

Affidavit of William C. Chanler, February 15, 1963

[4955]

— ◆ —
[CAPTION]
— ◆ —

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

WILLIAM C. CHANLER, being duly sworn, deposes and says:

I am a member of the firm of Winthrop, Stimson, Putnam & Roberts, attorneys for additional defendants Irving Trust Company and Ben-Fleming Sessel in the above-entitled case. I make this affidavit in support of the motion of said additional defendants pursuant to Rules 37(b)(2), 37(d), 41(b) and 41(c) of the Federal Rules of Civil Procedure, for an order dismissing with prejudice the counterclaims asserted against them herein by defendant Hughes Tool Company (Toolco), on the ground of Toolco's willful failure [4956] and refusal to comply with orders of this Court pertaining to discovery proceedings herein. I also make this affidavit in support of an application for the immediate entry of a final judgment of dismissal of the counterclaims, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

I have read the affidavit of Bruce Bromley which is submitted in support of the motion of the additional defendants, and I adopt the statements therein contained with respect to the procedural history of Toolco's defiance of discovery orders of this Court. I would also note that my clients have also incurred huge expenditures in defense of this lawsuit from the time they were brought in as additional defendants in February of 1962.

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It is appropriate for me to observe that a notice to take the deposition of Toolco by Howard R. Hughes, its Managing Agent, was served and filed on behalf of my clients on or about February 23, 1962. A copy of this notice is annexed hereto as Exhibit A and made a part hereof. A motion for the production of documents by Toolco pursuant to Rule 34 of the Federal Rules of Civil Procedure was served and filed on behalf of my clients on or about February 26, 1962, and was granted by the Special Master on March 6, 1962 (Tr. 2760). Finally, my clients joined in the motion for the production by Toolco of the "tax" documents pursuant to Rule 34 (see Tr. of January 17, 1963, p. 24).

Thus, it is clear that Toolco's failure to proceed with the deposition of Hughes, its failure and refusal to produce documents pursuant to Rule 34 which were held not to be protected by the attorney-client privilege, and its failure and refusal to produce the "tax" documents, were in [4957] violation of the right to discovery afforded to my clients by the orders of this Court. Toolco's wilful and deliberate default in making discovery to my clients fully warrants the dismissal with prejudice of the counterclaims asserted against them.

Toolco has attempted to justify these defaults by an alleged eleventh hour discovery (after over a year of expensive and burdensome litigation) that its counterclaims should have been referred to the CAB at the outset, and by its assertion that the expense of further litigation will exceed the amount of damages recoverable from Toolco by plaintiff. It is quite apparent from evidence now in the possession of the additional defendants that these contentions are frivolous and sham, and are advanced in a patent attempt to conceal the true reason why Toolco has refused

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to proceed. That reason is that the documents and testimony which Toolco has refused to produce in accordance with this Court's orders would conclusively establish that the delays in obtaining financing and necessary flight equipment, which Toolco's counterclaims allege caused damage to TWA in an amount exceeding \$45,000,000, were the direct result of a deliberate and carefully planned scheme by Toolco and Hughes to reap millions of dollars in profits and tax savings at the expense of TWA, and were not caused by the additional defendants as alleged in the counterclaims (See, e.g., opinion and order of Special [4958] Master dated January 22, 1963 attached as Appendix C to the affidavit of Bruce Bromley).

(Sworn to by William C. Chanler on February 15, 1963.)

[fol. 4970]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
61 Civ. 2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY
and RAYMOND M. HOLLIDAY, Defendants,

—and—

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED
STATES, METROPOLITAN LIFE INSURANCE COMPANY, IRVING
TRUST COMPANY, ERNEST R. BREECH, DILLON, READ & CO.
INC., BEN-FLEMING SESSEL, JAMES F. OATES, JR., HARRY
C. HAGERTY and CHARLES C. TILLINGHAST, JR., Additional
Defendants on Counterclaims.

ORDER TO SHOW CAUSE—February 16, 1963

On the pleadings, the pre-trial orders of this Court entered herein, the annexed affidavit of John F. Sonnett dated February 15, 1963, and on all the other proceedings heretofore had and papers heretofore filed herein, and good and sufficient reasons appearing therefor, it is

*Order to Show Cause, February 16, 1963 and
Affidavit of John Sonnett, February 15, 1963*

Ordered that defendants Hughes Tool Company and Raymond M. Holliday show cause before this Court at 5 P.M. o'clock on February 21, 1963, in Room 1305 of the United States Court House, Foley Square, New York, New York, or as soon thereafter as counsel can be heard, why an order should not be issued herein;

[fol. 4971] A. Providing that the complaint be amended by striking the third numbered paragraph of Section I of the prayer which follows paragraph 70 of the complaint and substituting therefor a new numbered paragraph 3 reading as follows:

"That the defendants pay to plaintiff \$135,000,000, or such other sum as shall be three times the damages sustained by plaintiff, together with costs and attorneys' fees;"

and further providing that the answer of defendant Hughes Tool Company, served and filed February 13, 1962, and the answer of defendant Raymond M. Holliday, served and filed March 26, 1962, shall each be deemed to relate to the complaint as so amended; and

B. Severing from these proceedings, from and after the date of such order, the claims herein made by plaintiff TWA against defendant Raymond M. Holliday; and

It Is Further Ordered that defendant Hughes Tool Company show cause before this Court at the same time and place why an order should not be issued herein:

C. Entering, pursuant to Rules 37(b), 37(d) and 55(b)(2) of the Federal Rules of Civil Procedure, a judgment by default against defendant Hughes Tool Company in favor of plaintiff on its complaint;

D. Adjudging and decreeing that defendant Hughes [fol. 4972] Tool Company, by the conduct alleged in the complaint, has violated Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act, and, with respect to the First Claim for relief only, Section 3 of

*Order to Show Cause, February 16, 1963 and
Affidavit of John Sonnett, February 15, 1963*

the Clayton Act and, with respect to the Third Claim for Relief, has maliciously and wilfully injured the business of plaintiff, and that Hughes Tool Company thereby has caused the injuries to plaintiff alleged in the complaint;

E. Adjudging and decreeing that defendant Hughes Tool Company shall divest itself of all right, title or interest in the stock of plaintiff;

F. Directing that defendant Hughes Tool Company present to this Court within 30 days from the date of such order, for the consideration of this Court in framing the final decree and judgment to be entered herein, a plan providing for divestiture by sale to the public through a bona fide public offering, within a period ending no later than one year from the date of such order, of all right, title or interest of defendant Hughes Tool Company in or relating to the stock of plaintiff, and providing that thereafter plaintiff shall have 30 days within which to submit to this Court, if it shall be so advised, proposed amendments or modifications to such plan or a proposed alternative plan; and enjoining, until such time that this Court shall have found that the divestiture by Hughes Tool Company of all its right, title or interest in or relating to the [fol. 4973] stock of TWA shall have been fully effectuated in accordance with a plan approved by this Court, defendant Hughes Tool Company, its directors, officers and employees, and all persons in active concert or participation with them who receive actual notice of such injunction, from interfering with, attacking or otherwise impairing or attempting to impair the existence, operation or validity of the voting trust established by execution of an agreement entered into by defendant Hughes Tool Company, the plaintiff, and three voting trustees, and dated as of December 15, 1960; and

G. Setting an early date for a hearing to be held before this Court solely for the determination of the amount of the damages to be paid by defendant Hughes

*Order to Show Cause, February 16, 1963 and
Affidavit of John Sonnett, February 15, 1963*

Tool Company to plaintiff by reason of the injuries alleged in the complaint to have been caused by Hughes Tool Company, together with the plaintiff's costs of suit and attorneys' fees; and

It Is Further Ordered that defendant Hughes Tool Company show cause before this Court at the same time and place why an order should not be issued herein:

H. Dismissing as against plaintiff TWA, with prejudice, pursuant to Rules 37(b), 37(d), 41(b) and 41(c) of the Federal Rules of Civil Procedure, each and every counterclaim asserted in the answer and [fol. 4974] counterclaims of defendant Hughes Tool Company served and filed February 13, 1962; and

I. Enjoining defendant Hughes Tool Company, its directors, officers and employees, and all persons in active concert or participation with them who receive actual notice of such injunction, from instituting or threatening to institute or causing to be instituted in any court in any jurisdiction within the United States any suit in which plaintiff, its directors, officers or employees, or any of them is a party and which contains or is based upon the allegations which are contained in said counterclaims of defendant Hughes Tool Company and from instituting or threatening to institute or causing to be instituted in any administrative or other agency within the United States any proceeding in which plaintiff, its directors, officers or employees, or any of them is a party and which is based upon such allegations; and

It Is Further Ordered that service of this order to show cause, together with a copy of the affidavit in support of this order, on Chester C. Davis, Esq., attorney for defendant Hughes Tool Company, on or before the 18th day of February, 1963, at 10 A. M. shall be deemed due and timely service.

Charles M. Meltzner, U.S.D.J.

Dated: New York, N. Y., February 16th, 1963.

*Order to Show Cause, February 16, 1963 and
Affidavit of John Sonnett, February 15, 1963*

[fol. 4975]

ATTACHMENT TO ORDER
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
61 Civ. 2324

TRANS WORLD AIRLINES, INC., Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY
and RAYMOND M. HOLLIDAY, Defendants,

—and—

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED
STATES, METROPOLITAN LIFE INSURANCE COMPANY, IRVING
TRUST COMPANY, ERNEST R. BREECH, DILLON, READ & CO.
INC., BEN-FLEMING SESSEL, JAMES F. OATES, JR., HARRY
C. HAGERTY and CHARLES C. TILLINGHAST, JR., Additional
Defendants on Counterclaims.

AFFIDAVIT

State of New York,
County of New York, ss.:

John F. Sonnett, being duly sworn, deposes and says:

1. I am a member of the firm of Cahill, Gordon, Reindel & Ohl, attorneys for the plaintiff Trans World Airlines, Inc. ("TWA"), and am familiar with the prior proceedings had herein. This affidavit is submitted in support of plaintiff's application for an order to show cause seeking the issuance herein of certain orders set forth in such application and more fully described below. This motion is brought on by an order to show cause because of the paramount importance of an early determination of the rights of TWA in the present posture of this litigation.

[fol. 4976]

2. An order is requested amending the complaint herein with respect to the First Claim for Relief to pray for

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judgment of \$135,000,000 or such other amount as shall threefold the damages suffered by TWA (instead of \$105,000,000). (Paragraph A, Order to Show Cause.) As is stated in paragraph 54 of the complaint as filed, the figure of \$35,000,000 was plaintiff's then first estimate of the minimum amount in which TWA had been damaged by defendants' wrongful acts. Subsequently defendant Hughes Tool Company ("Toolco") in its verified answer and counterclaims filed February 13, 1962 has estimated (paragraph 99) that TWA was damaged in excess of \$45,000,000, the factors of damage listed (paragraph 98) being the same as the primary factors of damage listed in the complaint. Defendant Toolco, together with defendants Hughes and Holliday, was in control of TWA throughout most of the period when the damage was being suffered.

3. As I stated to the Court on February 8, 1963, our investigations have led us to the conclusion that the damages suffered by reason of the injury to TWA alleged in the First Claim for Relief in fact exceed \$45,000,000. After trebling of this amount and addition of the more than \$10,000,000 in damages prayed for in the Third Claim for Relief, TWA's total prayer for damages exceeds \$145,000,000.

4. Since the filing of the complaint, the leading engineering firm of Coverdale & Colpitts has been retained to make a study to determine TWA's loss of net operating profits resulting (a) from delay in the delivery of 20 Convair 880 jet aircraft which TWA eventually got (Complaint, para-[fol. 4977] graphs 17 and 19), (b) from the diversion of 6 Convair 880's to Northeast Airlines (Complaint, paragraph 22), and (c) from the diversion of 6 Boeing 707's to Pan American World Airways (Complaint, paragraph 18). After months of intensive effort, Coverdale & Colpitts has completed its study of this matter and has advised that, in its opinion, the loss to TWA of net operating profits through delay in the delivery of the 20 Convair 880's was approximately \$14,700,000; from the diversion of 6 Convair 880's to Northeast Airlines, approximately \$9,000,000; and from the diversion of the 6 Boeing 707's to Pan American, approximately \$20,000,000, or a total of \$43,700,000.

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5. Other damages suffered by TWA through defendants' acts alleged in the First Claim for Relief are still under study, including particularly the increased costs to TWA of borrowing in 1960, due (a) to the general increase in the cost of money, and (b) to the change in TWA's financial condition which made it an inferior financial risk in 1960 from the standpoint of a lender. It is believed that such damage and the other factors of damage referred to in the First Claim for Relief of the complaint will increase the amount of TWA's loss when finally ascertained to substantially in excess of \$45,000,000.

6. No rights or interests of defendants will be infringed by the requested amendment of the prayer for relief since the denials contained in the answers of both defendants who are now parties can be deemed to apply to the complaint as amended in accordance with this request.

[fol. 4978] 7. An order directing the severance from this cause of TWA's claim against defendant Holliday is requested (Paragraph B, Order to Show Cause), because it appears that Holliday has not yet chosen the course of deliberate, intentional and wilful default. On the other hand, plaintiff is entitled to maintain its claims against Holliday, and to the benefit of the prior proceedings herein insofar as they relate to those claims, at least until its claims against Toolco have been finally disposed of and the judgment thereon in favor of TWA has been satisfied. A severance is the simplest means of preserving the rights and present positions of the parties.

8. The next category of orders requested by plaintiff relates to entry of a default judgment in TWA's favor against Toolco for the relief requested in the complaint (Paragraphs C-G, Order to Show Cause).

9. The Court is fully familiar with the record of wilful, deliberate and intentional refusal on the part of Toolco to comply with the Court's orders, culminating in its direct and express refusal, first through a "Notice of Position" served and filed February 8, 1963, and thereafter on the record in open court at a hearing before this Court held the same day:

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(a) to produce documents ordered to be produced by this Court's order of January 10, 1963, reaffirmed in this Court's order of January 19, 1963, an appeal from which orders was dismissed by the Court of Appeals for this Circuit on January 23, 1963, and as to which all stays have long expired, (b) to produce documents ordered to be produced by this [fol. 4979] Court's order of February 1, 1963, as to which all stays have expired, (c) to submit to any further discovery whatsoever in this action on behalf of plaintiff TWA, and (d) to produce a witness for examination before trial pursuant to the order of this Court, Toolco having expressly and with full knowledge of the consequences accepted the duty and obligation to produce such witness, and neither inability to produce such witness nor any other legal excuse for such refusal being presented.

10. As the record stands, there can be no question but that on the consent of Hughes Tool Company, and based on this series of deliberate defaults, plaintiff is entitled to apply to this Court for a judgment in its favor for the relief sought in the complaint. (See Transcript of Hearing, February 8, 1963, pp. 62-63.) Defendant Toolco now stands charged by the complaint with violations of the antitrust laws and (in the Third Claim for Relief) with intentional tortious interference with TWA's business relations. It has deliberately placed itself in the position, by refusing to defend against those charges, of admitting their accuracy.

11. The legal theory upon which plaintiff here proceeds is well established and indeed long predates the adoption of the Federal Rules of Civil Procedure in which it is now clearly embodied. It rests upon the "presumption that the refusal to produce evidence material to the administration of due process [is] but an admission of the want of merit in the asserted defense." *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909).

[fol. 4980] 12. By thus wilfully and deliberately refusing to comply with the orders of this Court, Toolco must, it is respectfully submitted, be presumed to have admitted the want of merit in any defense it might assert to the complaint. It has intentionally and with due reflection elected

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to default rather than let the truth come out. By so electing, Toolco has irrevocably abandoned any right to contest hereafter any allegation of the complaint, except as to the exact amount of money which it is to pay over to TWA for the injury it has admittedly caused TWA, and has abandoned as well any and all alleged defenses.

13. On previous motions in this cause, and particularly in connection with Toolco's motion to dismiss the complaint which this Court denied on February 6, 1963 (the opinion on which was filed February 7, 1963), we presented to this Court not only evidence of the legal merits of TWA's charges against the defendants, but evidence that the conduct of defendants was so deliberately and intentionally wrongful to TWA that, it is respectfully submitted, the wrong cannot be remedied without granting plaintiff both the divestiture and the injunctions which it seeks. The Court is respectfully referred to my previous affidavit dated February 1, 1963 and to the exhibits (A through D) filed in connection therewith, all of which are incorporated herein as if fully set forth in this affidavit, for evidence both of the wilful character of these wrongs and of the blatant nature of the violations of Sections 1 and 2 of the Sherman Act and of Section 7 of the Clayton Act charged in the complaint. The Supreme Court has held that divestiture is the specific and [fol. 4981] most appropriate remedy for such violations. *United States v. E.I. DuPont de Nemours & Co.*, 366 U.S. 316 (1961). It is submitted that, on the now indisputable violations of the antitrust laws set forth in the complaint, under the *DuPont* decision divestiture is not only appropriate but required.

14. Beyond this, even on the basis of the limited documentary discovery which TWA has had since it filed its complaint, the record herein contains compelling evidence of the need for divestiture. To cite but a few examples, Hughes, in November 1960, told an important Convair figure [Crown] that in return for financial support in staying off the Dillon, Read financing plan, Hughes would have TWA meet its future aircraft needs by purchases from Convair (Exhibit A19 to my affidavit of February 1, 1963).

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In February 1961 (after the voting trust had gone into effect) Hughes was questioned by Holliday and Convair about his intentions with respect to 13 Convair 990 aircraft then on order by Toolco (7 of which had been ordered after the voting trust took effect); Hughes said "It is not up to Convair to decide whether TWA will accept the so-called 97% of the airplanes. This has never been a matter for discussion. However I obtain TWA acceptance to this is my own problem; most likely HTCo will control TWA when that matter comes up" (Exhibit A35). The defendants' efforts to force these aircraft upon TWA are reflected in the report of a conference between Toolco's counsel and Dillon, Read in May 1961: "[Davis] said that we should know that his client had every intention of doing everything he could to 'bust up the Boeing deal'" (Exhibit A45). Similarly, it is patent from the other documents which make [fol. 4982] up Exhibit A that the defendants habitually exercised the unbridled power to determine when, if ever, how many, how, what and from whom aircraft were to be acquired by TWA. The Leslie "Appreciation" and Bew affidavit (Exhibits B and C to my affidavit of February 1, 1963) provide further evidence of how Toolco and the other defendants dealt with TWA and why divestiture is absolutely necessary herein.

15. Merely ordering that Toolco divest itself of all right, title or interest in TWA's stock by a sale to the public within one year is not, as experience has unfortunately and clearly demonstrated, the complete answer. Pending permanent removal of this incubus from this great airline, TWA must be free to act without those restraints and that interference which has heretofore characterized the conduct toward TWA of Toolco and those acting in concert with it. For this reason, it is submitted that Toolco must, during the interim period before divestiture is finally effectuated, be enjoined from interfering with, attacking or otherwise impairing or attempting to impair the existence, operation and validity of the voting trust which was agreed to by Toolco and which was intended to free, but has not fully freed, TWA from the vicious influence exerted by the defendants over its affairs (Paragraph F, Order to Show

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Cause). Such relief would appear to be the minimum required to assure cessation by Toolco and those acting in concert with it of the wrongful acts of which they now have admitted guilt.

[fol. 4983] 16. TWA requests that a date be now fixed for the hearing on its damages before this Court (Paragraph G, Order to Show Cause). Plaintiff will be obligated to present evidence as to several different types of damage which will require it to arrange for a number of witnesses, including expert witnesses. Our present estimate is that the hearing for calculation of TWA's damages, costs and counsel fees should require no more than ten trial days, assuming reasonable cross examination of plaintiff's witnesses. The schedule to be followed in preparing for this hearing should be fixed at this time, and it is respectfully submitted that TWA's financial needs and the importance to it of securing the redress to which it is entitled are such that the date fixed should be as early as is practicable, in view of the Court's schedule, and, if possible, about one month from now.

17. The final category of orders requested by TWA relates to dismissal, with prejudice, of Toolco's counterclaims against TWA and certain injunctive relief in connection therewith (Paragraphs H and I, Order to Show Cause).

18. It is respectfully submitted that the sweeping refusal of Toolco to comply with previous discovery orders and to participate in any respect in further discovery proceedings in this litigation makes dismissal with prejudice of the counterclaims, as Rules 37(b), 37(d), 41(b) and 41(c) contemplate, the appropriate relief for TWA. The requested injunction against Toolco's raising again in some other jurisdiction or before some administrative agency the same allegations which it here was unwilling to pursue (when the price of such pursuit was to let the facts be known) is closely related to TWA's other needs for injunctive relief (see e.g., Paragraph G, Order to Show Cause). The propensity of Toolco and those acting in concert with it to turn to numerous forums within which to harass TWA and interfere in its affairs is clearly evident from the alle-

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gations of the complaint which Toolco can no longer contest. It is a propensity which, it is respectfully submitted, this Court should now curb.

19. No previous application has been made for the relief sought herein.

WHEREFORE, I respectfully request that plaintiff TWA's application be granted and an order issued in the form annexed.

John F. Sonnett

Sworn to before me this 15th day of February, 1963.

THOMAS J. CERNA
Notary Public

Thomas J. Cerna, Notary Public, State of New York,
No. 41-0607760, Qualified in Queens County, Certificate filed
in New York County, Term Expires March 30, 1963.

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[24946]

[CAPTION]

Before:

HON. CHARLES M. METZNER,
District Judge.

[APPEARANCES:]

* * *

[24948] The Court: Mr. Barr, I assume that this letter which you gave to the clerk a few minutes ago, with the attachment to it, is in relation to the motion by the additional defendants.

Mr. Barr: It is, your Honor. It merely refers to the documents, and they are not in the courtroom at the moment but they are outside.

The Court: That would be enough to scare anybody.

Mr. Davis: May I ask if that was a letter as to which the Tool Company should be aware?

The Court: A copy of this letter and index will be furnished to each counsel, it says.

Mr. Barr: That is right, your Honor. That is a list of the documents that have been on file before the special master, and I assume Mr. Davis has copies of all of them.

The Court: Have you given this to Mr. Davis?

Mr. Barr: We will, sir.

The Court: Do you want to give it to him now?

Mr. Barr: Yes, your Honor (handing to [24949] Mr. Davis).

The Court: The first thing I want to dispose of is a notice of motion that was filed by the additional defendants

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on January 25, 1963, returnable February 18, 1963, to dismiss with prejudice the counterclaims by the Hughes Tool Company on the ground that the Tool Company deliberately refused to comply with the order of the Court.

I assume that motion is withdrawn, and will be so marked by the Court, in view of the fact that you have embraced that as a ground of the motion returnable today to dismiss the counterclaims.

Mr. Bromley: That is right, your Honor.

The Court: I should also inform you, although you know it already, that the motion that was brought on by the Tool Company to stay the proceedings regarding the counterclaims pending an action by the CAB was denied at the time of the hearing on February 8th. That appears on page 56 of the transcript, and I have so endorsed those motion papers.

We then have a motion by the Hughes Tool Company which was filed with the Court on February 13th, at a quarter to 5, along with a notice of [24950] amendment to that notice of motion, which was filed with the Court this afternoon at 4 o'clock, which requests reargument of the Court's order and decision of February 6th and 7th, and also requests that an order be entered referring to the CAB certain questions set forth in that notice of motion, and also requests an order admitting as part of the record copies of various CAB orders in related proceedings under Section 408 of the Federal Aviation Act.

The notice of amendment of that notice of motion, which was received by the Court at 4 o'clock, requests the Court to stay all proceedings on the complaint as are directed to claims seeking an award of damages pending a final determination by the CAB as to whether the conduct of Toolco relating to equipment acquisitions and financing

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of TWA was authorized, approved or required by any order of the CAB or whether such conduct was not inconsistent with the public interest and, secondly, pending a final determination by the CAB with respect to the complaint of Hughes Tool Company and request for investigation, which was filed by the Hughes Tool Company with the CAB on February 6th relating to the counterclaim.

[24951] The application for reargument is denied. The affidavit of Mr. Davis, sworn to on February 13, 1963, is not to be considered as part of this record.

Rule 9(m) of the General Rules of the Southern District requires that on a motion for reargument counsel submit to the court a memorandum setting forth wherein it feels the court erred. Such a memorandum was not submitted to the Court; and, secondly, the Court will not consider affidavits on application for reargument.

The application for an order referring certain questions to the CAB is also denied.

The application for an order admitting as part of this record certain orders of the CAB is also denied. The material that is sought to be admitted was not before the Court on the submission of the original motion and therefore will not be considered as part of that motion.

This refers to two orders of the CAB, those of '44 and 1950, known as 6 CAB 153 and 12 CAB 192. Those orders and the order of the CAB dated December 2, 1960, which is known as order No. E-161195, were considered by the Court and will be considered as part of the record.

[24952] In so far as the notice to amend the notice of motion, which I am now discussing, that motion is also denied. The Court will not stay any further proceedings in this action.

We come therefore to the motion by the plaintiff, TWA.

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Mr. Davis: If your Honor please, before proceeding further, may I ask if your Honor would indicate on the record whether or not the affidavit which was annexed to the motion of February 13th, that is, my affidavit dated February 13th, I believe——

The Court: It is.

Mr. Davis: —may be part of the record. It was intended to be, in part at least, in support of the application for a stay.

The Court: Application for a stay of what?

Mr. Davis: The one that your Honor just denied a moment ago, namely, which was part B of the notice of motion dated February 13, 1963.

I understand that the notice of motion of February 13, 1963, sought, No. 1, an order granting reargument, which I understand has been denied.

The Court: Right.

[24953] Mr. Davis: It also sought a stay, which has also been denied.

The Court: That is right.

Mr. Davis: I understood your Honor to rule that my affidavit in support of both those motions was not to be considered as part of the record for the purpose of the consideration of the order denying reargument.

I am requesting, for clarification purposes, your Honor, whether or not that—all or part of it—may be a part of the record in connection with the motion for the stay, which I understand your Honor is also denying.

The Court: No, it may not be, because that goes to my fundamental decision of February 6th and 7th. Whatever was in the record before the Court on February 6th and 7th will be part of the record.

You applied for a stay at that time and I denied it to you, except that I gave you until 5 o'clock on Friday,

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February 8th, to apply to the Court of Appeals for a stay, and you saw fit not to do it.

Mr. Davis: I have obtained the clarification I sought, your Honor.

【24954】 The Court: Mr. Sonnett, on your motion, I am ready to hear you.

Mr. Sonnett: In order, your Honor, to get at least myself oriented to what is before the Court today, because I find the Tool Company papers disorient me——

The Court: You just address yourself to what you have asked the Court to do and then you will be oriented to that extent.

Mr. Sonnett: I would like to recall, before coming to the specific motion, to your Honor the portion of the transcript at the last previous hearing, commencing on the bottom of page 60 and going through to 63.

The Court: Go ahead.

Mr. Sonnett: That, as your Honor will recall, resulted in what I am sure the Court and everyone else clearly understood to be agreement by counsel for the Tool Company with a statement which your Honor made at page 62 as follows:

“In other words, the understanding of the Court is that you”—meaning TWA—“have now an anticipatory default for failure to appear which will ripen at 10 o'clock Monday, February 【24955】 11th, on consent of Hughes Tool Company, the only defendant here with the responsibility, I assume, to answer in money damages to your claim. And then you are free to move for a dismissal——”

The Court: There is a misprint in that. I thought he was going to say “Monday damages,” but I don't know what they are.

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Mr. Sonnett: Well, we will take them any day, your Honor.

It seems to me that that record was perfectly clear and understood by everybody, and I thought including the Hughes Tool Company.

Pursuant to that record, as your Honor knows, Monday came and Mr. Hughes did not appear. We submitted an order to show cause, supported by an affidavit of mine, and that order to show cause seeks, in terms of purely technical relief, that the prayer of the complaint—only the prayer of the complaint—with respect to the amount of damages be amended. I think I indicated—I am sure I did—the last time the reasons for that, and that is the substantive allegation in the complaint stated that we estimated the damages to be in excess of [24956] \$35 million; the Tool Company in its counterclaims, referring to the same items of damages in sum identical, said that the damage was \$45. Our investigation by our experts proves that the damages on the antitrust claims are in excess of \$45 million.

We, I must say, had no reason to anticipate the default of the Tool Company, its wilful and deliberate choice to default, which occurred before this Court at the last session.

I think, therefore, that since the default judgment rule provides that on a default the plaintiff should get no more than the relief demanded in the complaint, the prayer of the complaint can and should be amended to conform to the substantive allegation and that we should thereafter have the hearing on damages which we have asked your Honor to order. No substantial right of the Tool Company has been or can be prejudiced by that amendment.

The Court: What about Rule 56(c)? I am sorry, I meant 54(c).

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Mr. Sonnett: 54(c), your Honor, relates, I believe, only to the entry of the judgment by default. That is to say, that the judgment by default, when entered, shall not be different in [24957] kind from or exceed in amount that prayed for in the demand for judgment.

Prior to your Honor's entering a judgment in this action, I think your Honor has complete control over it and may permit amendments to the pleadings and may permit, as we request, a severance of the action as to Holliday. I think your Honor's power is plenary under the Rules until you have entered the final judgment to be entered into the case.

The Court: Let us take one point at a time.

Isn't it perfectly possible—I suppose I have to say this facetiously—isn't it perfectly true that a defendant may be willing to suffer a default for \$105 million but will not suffer a default for \$115 million? If he is willing to pay \$105 million and if you say, "No, I want \$115 million," haven't you put him over a barrel?

Mr. Sonnett: I see no tender in the papers of payment of \$105 million. If that tender is made, I will be happy to take it up with the TWA board immediately.

The Court: Do you have to go that far?

[24958] Mr. Sonnett: I am afraid so, your Honor, because I think that the determination of the damages which are not liquidated damages—in this case, as the substantive allegation of our complaint points out, we estimated the damages to be in excess of \$35 million—since they are not liquidated, it seems to us necessary to be a determination of the amount. That being so and since no default judgment has yet been entered, it seems to me your Honor has the power to grant amendments——

The Court: Yes, I understand that. But what you are saying is that you have a default and you want to hold on to

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that default, but at the same time you want to recover more than you asked for in your complaint.

Mr. Sonnett: We don't have a default judgment, your Honor.

The Court: No, but you have a default, and based on that default you are asking for a judgment.

You want to let them off the hook on a default?

Mr. Sonnett: If the position of the Hughes Tool Company—which is what I indicated to [24959] your Honor when I started—had been confused, if their position before your Honor today is that they consent on the money side to your Honor entering a judgment today for \$105 million, I can say to you that TWA will not oppose the entry of that judgment.

The Court: Their position has to be they defaulted. They cannot retreat from that position. They have stated on the record that they will not proceed with the deposition or any further discovery proceedings, and they said that Mr. Hughes would not appear on February 11th.

Then they say to you, "You can't get more than \$105 million from us."

You say no, you want \$135 million.

I have problems with that, Mr. Sonnett, so we will have to hold that for further research by the Court.

Mr. Sonnett: I think 54(c), your Honor, if I may suggest, the first sentence contemplates the situation where there is an entry of default judgment by the clerk, whether liquidated or capable of computation by the clerk under Rule 55(b)——

The Court: If they said that—and I think these rules are very carefully drafted—I [24960] think they would have referred to subdivision (a) of the rule you are referring to, which provides for entry of judgment by the clerk.

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Subdivision (b) provides for an entry by the Court. The drafters of the rule did not see fit to distinguish between subdivisions (a) and (b), and therefore I would have to rule that the words in Rule 55, 54(c), "a judgment by default," must refer to both of them.

Mr. Sonnett: I have had called to my attention Moore and a citation purporting to sustain the proposition that where a hearing is had to determine the amount of unliquidated damages—certainly we have unliquidated damages by reason of the substantive allegation—and the defendant participates in the hearing, the court, in the exercise of sound discretion, may permit the claimant to amend his prayer for relief, citing a series of cases. I am reading from page 1823 of Moore's Federal Practice, Vol. 6.

I think your Honor has the power.

The Court: Perhaps we can clarify this whole thing by determining whether you are moving under a default judgment or whether you are really moving under Rule 37(b), subdivision 2 thereof, for [24961] failure to comply with an order of the court. Which are you moving under?

Mr. Sonnett: It was our intention to move under all the rules, your Honor, so as to be sure to get all the relief we think we are entitled to.

In terms of your Honor's discretion on that point, may I say that obviously, if substantively TWA and its minority stockholders are entitled to damages in excess of \$35 million, I would think that your Honor's discretion should be moved to permit the amendment if your Honor has the power to permit it, and I think this case holds that you have.

The Court: All right. Go ahead.

Mr. Sonnett: In so far as the severance with respect to Holliday is concerned, your Honor, the reason why, we

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had no way of knowing that the Hughes Tool Company was going to choose, as it did, deliberately, intentionally, wilfully, not to defend this case, and when that became apparent to us we then for the first time were confronted with the problem of what to do about Mr. Holliday. We think a severance as to Mr. Holliday is appropriate. We think that undoubtedly, after the judgment has been satisfied, [24962] there would be no occasion to proceed against Mr. Holliday because TWA would have been made whole.

There may be some question of particular injunctive relief that might be appropriate or necessary as to Mr. Holliday individually, but I don't think we need to take a position on that now, except to suggest that it is a possibility and we cannot tell.

The Court: Mr. Davis represents Mr. Holliday in addition to the Hughes Tool Company.

Mr. Davis, are you in a position to say that Mr. Holliday adopts the position of the Hughes Tool Company as indicated on February 8th?

Mr. Davis: Yes, I am, your Honor, and if it will help to solve the matter I am perfectly willing to do so.

The Court: You have objected to the severance in your papers.

Mr. Davis: I do not see any basis for a severance, your Honor. I don't understand what the plaintiff is trying to do by asking for a severance.

The Court: He is an individual defendant who has been served in this action and I am asking [24963] you, are you representing that Mr. Holliday takes the same position of the Hughes Tool Company so that they will be treated together and no severance is needed?

Mr. Davis: Yes, your Honor. The Tool Company is responsible for whatever Mr. Holliday did or did not do. It would have to—

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The Court: I think that clarifies that point.

Mr. Sonnett: I would therefore request that our motion for severance of Mr. Holliday be withdrawn, or deemed withdrawn.

Turning to the substantive portion of our order to show cause, your Honor, we have asked in paragraph D for an adjudication that the Hughes Tool Company, by the conduct alleged in the complaint, has violated the relevant provisions of the anti-trust laws and, with respect to the third claim for relief, has maliciously and wilfully injured the business of plaintiff, and that Hughes Tool Company thereby has caused the injuries to plaintiff alleged in the complaint.

In that connection, as I read the affidavit served by counsel for Hughes Tool Company this [24964] afternoon, an effort is made in that affidavit to say that the legal effect of the consciously deliberate default is not or should not be an admission and should not lead to an adjudication such as we requested but rather they should be in substance free to go ahead and litigate any and all issues they would like to litigate.

Of course they would do this on the basis of selecting such evidence as they have that would be favorable to them but denying TWA access to any of that evidence, which is a strange method of procedure and I don't think it has ever been sanctioned by any court.

In so far as the legal effect of what they did and have done on this record, it seems to us clear, your Honor, under the cases, and certainly going back to the Hammond Packing case, that with respect to the deliberate, wilful, conscious choice not to defend against the complaint they have thereby admitted they have no defense. As the Supreme Court said in the Hammond case, they have admitted a want

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in merit in any alleged defense, and therefore the allegations of the complaint must be taken to be admitted for the purpose of this proceeding.

[24965] One of the key allegations in the complaint of course is the allegation that the acts alleged caused the injuries described, and this allegation too must be admitted.

When they consented to a default judgment it seems to us, your Honor, that the Court could not issue a judgment of any kind; it would be beyond the judicial power of the Court to issue a default judgment with respect to relief in a private antitrust action without the judgment embodying the determination that the acts violated the law and, as the statute requires, that the acts caused injury to the property or business of the plaintiff.

While we do not urge that they have admitted the amount of the damages, except to say, as they do in the counterclaims, that the damages to TWA were \$45 million, we do think that is an admission sufficient so that we can say to your Honor we want three times \$45 million simply because of what they say in the counterclaim.

We think there has to be a hearing to determine what are the unliquidated damages. Nevertheless, the legal effect, the irrevocable legal effect, of what they have done is to admit what we [24966] have set forth in paragraph D of the order to show cause.

One additional and, I think, wholly independent point in that connection is that by the deliberate and conscious and wilful choice with respect to their default relating to the counterclaims they have there again put themselves, as a matter of choice, in the position where a dismissal of those counterclaims with prejudice is the natural and inevitable outcome, and, if that is so, the result, it seems to us, is that it is now or will be upon the entry of your Honor's

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order to that effect res judicata that the injuries to TWA were not caused as alleged in the counterclaims and they would be estopped by the judgment to contend otherwise.

As to the next prayer for relief, your Honor, the adjudication that the Tool Company should divest itself of all its rights, titles or interests in the stock of plaintiff, I have to report to your Honor that our research has not yet discovered a private antitrust suit where divestiture has been ordered. Our research has not discovered a private case where divestiture has been refused. The three, I believe, cases that would be most helpful in relation to Section 7 are not cases where the question was ever reached. It was not reached in the sugar case, although in that case the prayer in the complaint asked for divestiture. The fact is that the prayer was not pressed during the case, your Honor. So that we have no specific precedent relating to a private litigant.

However, I need not remind your Honor of the Du Pont case, or the words of the Supreme Court concerning remedy—

The Court: I had the Du Pont-General Motors minority stockholders suit. I am completely familiar with that.

Mr. Sonnett: Having mentioned the Du Pont case, let me pass to the point that if ever a case called for divestiture, this is the classic case that called for it, because these are the kinds of abuses which I think Section 7 was intended to reach.

In that connection, without pressing the facts unduly, your Honor will recall that in February of 1961, after the voting trust had been in effect, Hughes stated—we have his words and they are on a piece of paper, Exhibit A—that Convair need not concern itself about whether TWA would or would not [24968] take Convair 990 aircraft that

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Hughes had on order; that Hughes would attend to that matter, and it might well be that Hughes would be back in control of TWA at that time.

I think the record before your Honor factually as well as legally compels the conclusion that the only suitable remedy here is the remedy of divestiture. Certainly any equitable relief short of divestiture will accomplish nothing. We have only to look at the record of what has happened since the voting trust, to which Hughes agreed in November, 1960, was signed and the campaign of attack and efforts by the defendants to impede that voting trust.

Here was a document that thick, worked on by dozens of lawyers, articulating a voting trust fully accepted by the Tool Company, and the ink was hardly dry before they tried to tear it to shreds, as they are still doing. So that equitable relief short of divestiture would be no relief at all, your Honor.

As to prayer F of our order to show cause, we think the record before this Court warrants the conclusion that divestiture should not only occur but that it should occur promptly, because the need of TWA [24969] to be relieved of this incubus is still very real. We have the same campaign of harassment, the same attack on the directors, the same attempts to conduct end runs by going down to the CAB and stirring up a fuss there, the same type of harassment to interfere with a management and a board which is trying to do what is right for this air line.

We have curiously at the same time an unwillingness, as a matter of choice, deliberate decision by the Tool Company, to submit these claims to a court having jurisdiction for decision, hence the deliberate choice not to defend in your Honor's court.

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Therefore, I submit, your Honor, that the record warrants and, indeed, requires the conclusion that divestiture should be had, and had promptly. There is no other way that this air line is going to be free of the pernicious influence of Hughes short of divestiture.

The final prayer, your Honor, is that we do have, as your Honor will recall, a request for an early date for a hearing to be held before the Court solely for the determination of the amount of damages. We think that is the only question that is open on this record, the amount of the damages, and that your [24970] Honor should have a hearing on that subject. We ask that your Honor have the hearing before the Court because we are confident, and the papers served by the Tool Company today make it all too evident, that a hearing on damages is going to require immediate, decisive rulings by the Court; and with the greatest respect for the excellent job the special master has done, I am confident that we will be running up here every day, interrupting your Honor's other work, or trying to, getting rulings on points that will have to be disposed of. The hearing will be pandemonium, really, in light of the affidavit.

For example, are we going to try the question of a Capitol 880 crash? What does that have to do with the allegations in our complaint and damage? They have admitted the allegations of the complaint and that those activities caused the injury which was described. The only question is how much.

Unless this has firm judicial control, the hearing will turn out to be 10 months instead of 10 days.

I can only say to your Honor, without trying to gild the lily in that regard, that all of [24971] the equipment program of this air line is suspended in terms of future equip-

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ment. They have an acute need for short-range jets and for cargo ships. They cannot move on that, they cannot go forward at all on that, in light of this situation.

Your Honor may have noted in the Wall Street Journal that the chairman of the board of TWA said yesterday that if TWA received a substantial award of damages in this case—he was making a speech in Kansas City——

The Court: I do not read the Wall Street Journal. I apologize to any representative of the Wall Street Journal.

Mr. Sonnett: It is not only a fine newspaper, but it is also one of the few, which makes it even finer.

But they did report that Mr. Breech, during the course of a luncheon, I think, while speaking about the air line, stated that if TWA received a substantial award of damages in this case the terms of the proposed merger with Pan American would have to be reopened to renegotiate.

So we have not only the equipment program of the air line being suspended; we have this [24972] merger problem in the background.

In the meantime we have the Tool Company's minions running around Washington trying to create some kind of back fire, and the air line's need for an early determination is just as acute as its need for a full determination of its damages.

So that I am very mindful of the heavy schedule that your Honor has been fulfilling here for some months; and obviously not meaning any disrespect to the Court, but our associates have come to refer to this as the night court because your Honor sets sessions after the conclusion of a full day, which is a great sacrifice on your Honor's part, but I do think the administration of justice overall would be best served by your Honor conducting these hearings as soon as may be feasible, consistent with your Honor's schedule.

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As to the counterclaims, your Honor, that will be argued to you by others. We have joined in the motion to dismiss the counterclaims with prejudice, and the only point, so far as TWA is concerned which it has that the additional defendants do not have, is our prayer in paragraph I of the order to show cause for interim injunctive relief.

[24973] There, as the Court will recall, we asked that there be injunction against impairing or interfering with the voting trust pending the consummation of divestiture. It seemed to us that that was the easiest, most effective, most precise and simplest way to maintain the status quo, at least in terms of additional attack by the Tool Company, until the divestiture could be consummated.

The other aspect of paragraph I which we think this record warrants, and, indeed, which TWA needs, is an injunction, also pending the consummation of divestiture, against instituting or threatening to institute or causing to be instituted suits in any other jurisdiction in which TWA, its directors, officers or employees are parties, which suits embody the allegations of the counterclaim. We think that we are entitled to that bill of peace.

The Tool Company had its opportunity to litigate all of these matters in this court with its eyes wide open and, I am sure, fully conscious that they were better off not to have the truth come out than to have it come out. They decided not to defend this case and not to press their counterclaim. I think they are entitled to peace and **[24974]** quiet until the Court finally issues the relief by way of judgment. We think we are entitled to the damages and divestiture.

That is all I have, your Honor, unless you have a question.

The Court: Mr. Davis.

Mr. Davis: We want the truth to come out. We would have the truth if we had answers to interrogatories.

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So far as lack of financing that apparently is bothering TWA now and which in the past the Tool Company provided is also the basis for which this complaint has been filed against the Tool Company.

One thing that counsel for TWA says—and I am sure it must be inadvertent—and that is when he refers to the page of the transcript he referred to and then, in the course of his statement, makes references to the Tool Company having consented to a default judgment.

I want to make it clear that the Tool Company has not consented to a default judgment, does not consent to a default judgment and does not intend to.

The Court: You said you would not [24975] proceed and Mr. Hughes would not appear, and now the Court is presented with what it is going to do to you.

Mr. Davis: That is correct, your Honor. There is a big difference between saying that the Tool Company, for the reasons it stated at the time and by reason of the practical effects with which it was confronted, by reason of the proceedings today, to take the stand that it took, fully aware as to what might be the consequences should it prove to be wrong, and another thing to say that we are consenting to the entry of a default judgment. I believe that counsel for TWA is fully aware of the distinction, as well aware as I am sure the Court is.

Your Honor, I realize and I will apologize, if I should, for the time when we filed this affidavit in opposition to this motion brought on by an order to show cause, and I don't know whether or not to assume that your Honor has had an opportunity to even——

The Court: I read it very carefully, Mr. Davis.

Mr. Davis: Then it should not be [24976] necessary for me to repeat what is set forth in that affidavit.

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There is one thing I would like however to address myself to most seriously, particularly in view of the decision of the Court with respect to our motion on reargument, and that is that it is still imperative that this Court determine what it is in terms of conduct by the Tool Company which is the basis for these alleged damages, as well as what is the scope of what is to be adjudicated by any default judgment.

In that connection I am sure it is not necessary for me to point out that the Court has a continuing duty to consider its jurisdiction based upon the development of facts whenever they occur in the course of this proceeding.

The Court: Mr. Davis, you are leading right back to directing Mr. Hughes to appear for examination. Is that where you want to go?

Mr. Davis: No, your Honor. I believe it was a decision by your Honor when this Court recognized that a plaintiff has the burden of satisfying the Court as to its jurisdiction; but however that may be, certainly the plaintiff has the [24977] burden of establishing what it is he claimed injured him, and there is no question that that must be causally connected to the alleged violation that the plaintiff is claiming, and I am merely suggesting to your Honor that we can approach this question of causal connection between damage or injury and a course of conduct when we know what the course of conduct is.

There is no question, based upon the position we have taken, all the well-pleaded facts of the complaint are binding upon us, not the conclusions of law set forth in the complaint.

For instance, let me refer to the offenses charged in paragraph 9, particularly paragraph 9(b) of the complaint—that was quoted in your Honor's decision of February 7th—where it is said that there was a combination to re-

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strain interstate and foreign commerce in violation of Section 1 of the Sherman Act "by providing financing of the acquisition by plaintiff of aircraft, including jet-powered aircraft, only upon the condition that plaintiff acquire all such aircraft from defendant Tool Company." The key word there is "such."

It is a very well-drafted complaint, [24978] you Honor.

Now we can assume two states of facts. We can assume a state of facts where the Tool Company went to TWA after having acquired control and said, "TWA, we will provide you with all and any financing you need provided that you acquire all aircraft from us and only from us." I am sure that if Toolco had done that that it would be outside the scope of any authorization from CAB.

The other way that this reads, and in fact what has happened, is—because there is no question that TWA required aircraft from everybody, Martin, Lockheed, Boeing, Convair; that is in the record—what this says is, based upon the facts, what occurred is that the Tool Company, when TWA was unable to finance itself, would place the order for TWA, finance the aircraft and make them available to TWA. There is no question that the financing we provided in this case was only the financing for all the aircraft acquired from the Tool Company. That is also what the English in paragraph 9(b) means. That is the kind of conduct which I think was specifically approved by the CAB, because [24979] those are individual transactions which CAB approved.

Now, there are allegations in this complaint that there were delays in the acquisition of aircraft, on 880. All right. There were delays. Delays from when? Delays by reason of conduct by Toolco which is a violation of the antitrust laws or delays because Convair was unable to deliver or TWA

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could not obtain financing from these monopolies who control the financing of aircraft?

TWA, who is so anxious to bring out the truth, but they don't want to tell us ever, and all the depositions we took of TWA officers they were unable to tell us ever, what it is that the Tool Company did. They can talk in terms of conclusions of violations of law and state in a complaint what the statutes say and say we violated them, but no officer of TWA has been able to do it to date, and the record is there for anybody to read, and the special master listened to all of it, to find out from responsible officers of TWA what it is that we did. That has yet to be established.

I am not suggesting that this Court conclude that this complaint states the cause of action. [24980] Let us find out what other facts are well pleaded which identify the course of conduct that Tool Company engaged in and from which we can relate any question of damage to TWA.

What is the course of conduct that the Tool Company engaged in while it was a 78 per cent owner of TWA which harmed TWA? What is the course of conduct that TWA engaged in which was outside the specific approval of CAB? Those problems still exist.

In opposition, as basically set forth in this affidavit, notwithstanding the risk we have taken, we respectfully submit that we still have a problem of some procedure of requiring the plaintiff, based upon what the plaintiff knows or claims to know we are not going to be in a position to pull out any evidence, as Mr. Sonnett has suggested to oppose them. Whatever testimony the Tool Company or Mr. Hughes otherwise would be able to adduce, we are barred from this. We take that handicap.

Let them put any officer of TWA, or whoever else they want—the lending institutions who participated in these

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transactions—let them [24981] put them on and prove what we did or give some evidence of what we did. All I ask is to cross examine. Use their own documents. That is all I want to know: What did we do? That is what TWA has successfully resisted, but only in this sense. Your Honor affirmed the decision of the special master that they were to answer the interrogatories but provided they were to be answered only after the deposition of Mr. Hughes. We put that one to rest, at the risk we have taken, to be sure.

We have always claimed that we were in a position that, if TWA was required to state and identify what it is we did, with whatever intent they want to attribute to it, we admit it. Now what?

I believe the defendant has a right to do that if he is confident enough of his position and the facts. I don't think that conduct can be described as contemptuous or wilful, except that it is a wilful decision. It was and is a deliberate decision, fully aware of the risks involved. But that does not mean that we are to be punished because of our effort to save what otherwise would [24982] be the expenditure of millions of dollars because we had sufficient confidence that TWA, by no officer of TWA, by no other witnesses that exist in the world is capable of presenting a case identifying something which we did which can be attributed to a violation of the antitrust laws and damage to TWA, and I don't see any decision that I know of which would justify any other result but giving the plaintiff an opportunity to present its case, we merely to cross examine, and let us discover what the truth really is as to what the plaintiff claims.

They must know something, your Honor. If they were prepared to examine Mr. Hughes for so many months, they must know something. It isn't as though we refused to give them any information. We have given them all the docu-

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ments in our file, and then some, relevant or irrelevant, that were called for.

What are these documents he is quoting from? They come from our files.

The Court: He would like to have the tax documents.

Mr. Davis: They have had tax documents, your Honor.

[24983] The Court: The ones I said you were supposed to give him and which you refused to give him.

Mr. Davis: We did furnish tax documents, your Honor, which were granted confidential treatment by the special master. That was very recently, and after we had your Honor's decision of January 10th counsel for the insurance companies then asked for additional tax documents, including the 1961 and 1962 tax returns and some work papers, as if whatever may appear in the tax documents could conceivably be a defense to the counterclaims against the lending institutions.

We have been having a game going on——

The Court: You asked for it. You filed counterclaims for \$385 million.

Mr. Davis: There is no question that my client is going to have to take the consequences of whatever I have done, but I am merely pointing out that we are in a proceeding where we must carefully distinguish, when TWA asks for something, with those who control TWA, the additional defendants, deriving a benefit from the position taken by TWA, and when the present management of TWA conversely— [24984] which is all that is being represented in court, not the stockholders—takes a benefit out of the position being taken by those who install and are controlling that management, the lending institutions—I know they would like to prevent us from voicing our objections to the manner in which the air lines have been operated, to having

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this air line continue to be controlled by these lending institutions who acquired control without approval of any agency, and I don't think it is proper to try and still us, and whether or not they approve or disapprove of any suggestions or comments made by the Tool Company in 1961 I don't think is a basis for seeking this injunctive relief which counsel representing the present lender-control management of TWA is seeking. All we have done is to take the position that we do not believe that this plaintiff can establish facts which cause damage to TWA.

We respectfully submit that before there can be any effort at determining what those damages are, it is essential and we think that finally we are going to be entitled to require TWA to identify that conduct, and then we will be able to determine the extent to which the Tool Company may be answerable [24985] in damages to its 78-per-cent-owned TWA, assuming that a prior position with respect to the jurisdiction of this court is not sustained.

I do want to point out, however, in this connection that it could very well be that in the course of the development of the facts as to the conduct which TWA establishes as a basis for these damages the Court may very well want to reconsider its jurisdictional decision, because, your Honor, if there is one thing—

The Court: Let me ask you this and maybe we can cut it short. Mr. Davis, are you interested in a quick review of my prior decisions? If you are, isn't it possible for you, counsel for the plaintiff and counsel for the additional defendants to get together and draw a judgment which would be appealable without reference to either the special master or myself for the ascertainment of the specific relief required?

I think the Court of Appeals might look upon that as a final judgment, and you can get up there as quick as you

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want and have this all reviewed instead of spending the time and effort and the exorbitant amounts of money you refer to.

[24986] Mr. Davis: Your Honor, I will be glad to entertain that suggestion. I frankly would have to say to your Honor that I don't believe that is feasible.

We have been trying for some time, in fact, even before this case was assigned to your Honor for all purposes there was an effort made by Judge Ryan, to get the plaintiff to put up some statement as to what its position was—

The Court: We will pass that point now. All I am asking you is that if you are really interested in a fast determination of the propriety of my prior orders, especially the ones of February 6th and February 7th, would it be possible for you, Mr. Sonnett for TWA, Judge Bromley, Mr. Chanler and Mr. Stewart to get together and agree on a form of judgment which you think would be appealable and save all this time and effort and money which is undoubtedly going to have to be spent if you go through the long, drawn-out procedure of the hearing on the default judgment?

If I am wrong on what is the fundamental question as I see it from you, that this Court has no jurisdiction and you don't want a Panagra situation **[24987]** all over again, where you go through the court for seven years and the Supreme Court says you should not have been there, you should have been before the CAB, find that out now.

Mr. Bromley: I won't entertain your suggestion, your Honor, I will accept it right now.

Mr. Davis: May I address myself to something in that connection?

Mr. Bromley: All you need is a 54(b) certificate, your Honor, as far as the additional defendants are concerned.

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The Court: We also have the problem of TWA as a plaintiff, and I would not want half of this to go up without the other half.

Mr. Bromley: I will be glad to join in that, your Honor.

Mr. Chanler: We join in that, your Honor.

Mr. Stewart: We join in that, your Honor.

Mr. Davis: I would love to join them, your Honor, if I thought I could get what we are all seeking to do. The problem I have is twofold. One is what my position is if I consent to a judge- [24988] ment—

The Court: The old antitrust consent judgments say you don't consent to anything even though you consent to the judgment.

Mr. Davis: I understand that, your Honor, but I have real concern based on the research I made to date on that question.

Unquestionably it would require certification under 1292(b), unless something which occurred today gives me a right of review.

More important than that, your Honor, and quite sincerely, I would much prefer to be in a position of obtaining a review by the Court of Appeals after we have put some meat on this complaint, and the meat that I am referring to, your Honor, is the identification of what we did, because, your Honor, the thing that is disturbing me—and I did not reach the same conclusion that your Honor did in his decision of February 7th—I have read that decision more often than I read the Panagra decision, and I think I understand it at times—

The Court: You mean me or Panagra?

Mr. Davis: Panagra I had no difficulty with. I galloped through it and enjoyed every [24989] moment of it.

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It occurred to me, your Honor, that what I just demonstrated with respect to paragraph 9(b) of the complaint could very well be the key to the answer as to which way the decision ought to go. In other words, it is perfectly clear, your Honor, 408 refers to the acquisition of control, not merely the acquisition of stock. The acquisition of control necessarily means, by the rule of reason if nothing else, that you must be permitted to do something.

The Court: You were permitted to get control.

Mr. Davis: Does that mean sit there with the stock in my vaults? It is control over management and therefore decisions.

The Court: You and I are going to get into an argument about my decision, and let's not do that.

Mr. Davis: I am referring to the Court of Appeals, your Honor, and the desirability, if it is possible, in this procedural development—if it is possible for the purpose admittedly of furthering what has to be done in any event if they are right, [24990] that they are entitled to money damages—Mr. Sonnett just pointed out that they want that quickly and TWA needs money very badly. They have somebody else in control with more money than we have but apparently it isn't coming very easily. If we are going to get ourselves any posture to determine those damages, because there is no question we are not going to get together on that question—

The Court: The amount? They review it with the damages open. They have done that in the past.

Mr. Davis: If we are going to have to, or if we assume there is this damage which they are anxious to bring on as soon as possible, would it not make more sense, may I suggest, to have as a preliminary procedure an identification of this course of conduct which your Honor's prior decision

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did hold was to be finished by the plaintiff which then would permit a much more definitive decision not only with respect to this question of primary and exclusive jurisdiction but also for the purpose of determining damages, assuming that is the result to be obtained?

The Court: If I am wrong you are not [24991] going to need such a statement to prove I am wrong. I spent a lot of time on this and I am convinced I am right until I am told I am wrong by those who can tell me I am wrong.

I am merely saying that your time, other counsel's time, and, I am sure, the tremendous amounts of money that would be involved before you ever got a review of my determination if you follow the course you are suggesting could be saved. If I am wrong on the question of exclusive primary jurisdiction, let us find it out now and get that out of the way before you spend another nickel; and if I am wrong, you can go down to the CAB and they can have all the fun with this lawsuit that I am having.

Why don't you do that now? And I am sure that in view of what Judge Bromley said and the other counsel for the additional defendants, although I have not heard from Mr. Sonnett yet, they would facilitate the preparation of such a document to completely protect you to the extent that you need protection and still would come up with a judgment that would be reviewable by the Court of Appeals.

[24992] Mr. Davis: Your Honor, I certainly will cooperate with anyone who submits to me a document that they think I ought to give serious consideration to. I am merely pointing out in all fairness that I do not believe that will solve the problem.

The Court: You mean if the Court of Appeals says that I am wrong and you should go down to the CAB, that does not solve the problem?

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Mr. Davis: No, your Honor, I am referring to the procedure of our preparing or their preparing for my approval a proposed form of judgment that would be reviewable. That is what I do not believe will be feasible. It would require certification by your Honor, and I assume this implies you would be willing to do so.

The Court: I am not sure it involves a certification, but if it does I would be willing to certify.

Mr. Davis: The question is if they can prepare something which I am satisfied protects my clients' interests. That is a procedure I want to pursue. I am willing to try.

The Court: When do you want to sit [24993] down with counsel and try?

Mr. Davis: Any time they are prepared to submit something for me to consider.

Mr. Bromley: I will give him something tomorrow morning at 11:45, your Honor.

Mr. Davis: I am going to take this weekend off.

The Court: Give him the weekend, Judge Bromley.

Mr. Bromley: All right. I will, reluctantly.

The Court: Mr. Sonnett.

Mr. Sonnett: Your Honor said you had not heard from me on this subject, and I am most reluctant to try and agree with Mr. Davis on anything, even the form of a judgment, because I don't think we start from the same premise at all and I can see just wrangling and a waste of time involved.

My understanding is, and I believe it is the understanding of the Court, that the rule, 55, that we are talking about—55(b)(2)—is an outgrowth of the old equity rules, and it is my understanding that for at least a hundred years it has been settled under our rules that a decree pro confesso [24994] which is what we have here, in effect admits all the allegations in the complaint.

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I would like to invite your Honor's attention to *Thomas vs. Wooster* in 114 US, page 104, that being a very thorough discussion of the pro confesso rules, the old equity rules, where the court stated at page 110, for example:

"The defendants are concluded by that decree"—this being a decree entered on default—"so far at least as it is supported by the allegations of the bill taking the same to be true. Being carefully based on these allegations and not extending beyond them, it cannot now be questioned by the defendants unless it is shown to be erroneous by other statements contained in the bill itself. A confession of facts properly pleaded dispenses with proof of those facts and is as effective for the purposes of the suit as if the facts were proved and a decree pro confesso regards the statements of the bill as confessed."

Further, at page 111, the Supreme Court said, and it is only one sentence, your Honor, so I will trespass long enough to read it, if I may:

[24995] "We may properly say therefore that to take a bill pro confesso is to order it to stand as if its statements were confessed to be true and that a decree pro confesso is a decree based on such statements assumed to be true and such a decree is as binding and conclusive as any decree rendered in the most solemn manner."

Mr. Davis: How about reading the other part, John?

Mr. Sonnett: I will give the book to you and you can read the balance of it. It might do you some good.

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If what we are dealing with here was an effort to agree on the form of a judgment consistent with those rules and consistent with the Rules of Practice as I understand them, I would cheerfully sit down with Mr. Davis right now, but he would not start from those premises.

If he is prepared to do so, that is to say, to discuss only the form without consenting to or waiving whatever it is he wants to try to preserve on this record, if he is prepared to sit down and work on form and to take a form which carries out the [24996] complaint—and I think the form is very easily indicated in our order to show cause—I will be happy to sit down with him.

The Court: I have problems with the order to show cause. I am not sure you are entitled to relief under Section 7 of the Clayton Act. That is one example or one area that I will not agree with you on tonight.

Mr. Sonnett: I will be happy to file a brief or to present argument. I have the cases at hand, if you want to hear me—

The Court: No, not tonight. I think there is really no further point for argument on this motion, and perhaps not even on the motion by the additional defendants. I would suggest that if you don't want to join in this, we still have counterclaims around that can be disposed of and either Mr. Davis sit down with counsel for the additional defendants or the additional defendants can propose a proposed judgment to Mr. Davis which would be appealable, you can follow whichever course you want.

Mr. Bromley: We will follow the latter suggestion and hand him a proposed judgment.

[24997] The Court: All right.

Mr. Bromley: We will do that, so he will be good and rested, by Monday.

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The Court: Mr. Davis will have his comments on your proposed suggestions back to you by Thursday night at 5 o'clock.

I hold in abeyance the application by TWA pending a possible resolution of the counterclaim problem.

All right.

Order Re Leave To Appeal.

[5407]

[C A P T I O N]

**Application for Leave to Appeal Under Section 1292(b)
of Title 28, United States Code.**

**CHESTER C. DAVIS, New York, N. Y., for defendants Hughes
Tool Company and Raymond M. Holliday.**

Application to appeal the issues of (1) Whether the U. S. District Court for the Southern District of New York had jurisdiction of the action, and (2) Whether the exercise of its regulatory power by the Civil Aeronautics Board in the premises by issuance of orders permitting defendants to act as defendants acted constitutes a good defense to the anti-trust claim of plaintiffs [sic], is granted; and in all other respects the application is denied.

Proceedings before the district court or any master appointed to carry forward any proceedings below for the assessment of damages, or otherwise, are ordered stayed pending disposition of this appeal. Judge Friendly took no part in the consideration or the disposition of this application.

S. R. W.
J. J. S.
U. S. C. JJ.

6 June 1963

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[fol. 28014]

SUPREME COURT OF THE UNITED STATES

No. 443—October Term, 1964

HUGHES TOOL COMPANY, et al., Petitioners,

v.

TRANS WORLD AIRLINES, INC.

ORDER ALLOWING CERTIORARI—November 16, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 28015]

SUPREME COURT OF THE UNITED STATES

No. 501—October Term, 1964

HUGHES TOOL COMPANY, Petitioner,

v.

TRANS WORLD AIRLINES, INC., et al.

ORDER ALLOWING CERTIORARI—November 16, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Orders of the United States Supreme Court Dismissing
Certiorari in Nos. 443 and 501, March 8, 1965

SUPREME COURT OF THE UNITED STATES

HUGHES TOOL Co. ET AL.

—V.—

TRANS WORLD AIRLINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT.

No. 443. Decided March 8, 1965.

PER CURIAM.

The writ of certiorari is dismissed as improvidently
granted.

SUPREME COURT OF THE UNITED STATES

HUGHES TOOL Co.

—V.—

TRANS WORLD AIRLINES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT.

No. 501. Decided March 8, 1965.

PER CURIAM.

The writ of certiorari is dismissed as improvidently
granted.

Opinion of the Court of Appeals in Dockets No. 34902
and No. 35114, September 1, 1971

[CAPTION]

Before:

SMITH, KAUFMAN, and HAYS,

Circuit Judges.

Cross-appeals from a final judgment for plaintiff in the amount of \$145,448,141.07, upon a previous default judgment entered on a complaint alleging violations of the anti-trust laws, by the United States District Court for the Southern District of New York, Charles M. Metzner, *Judge*, following a hearing on damages before Special Master Herbert Brownell.

Modified with respect to interest on the judgment and as modified, affirmed.

JAMES V. HAYES (Ralstone B. Irvine, Mahlon F. Perkins, Jr., David A. Wier, *of counsel*; Donovan, Leisure, Newton & Irvine, New York, N. Y.; Davis & Cox, New York, N. Y., *on the brief*), for defendants-appellants.

DUDLEY B. TENNEY (Paul W. Williams, Immanuel Kohn, Marshall H. Cox, Jr., Abraham P. Ordoover, Lawrence C. Browne, Michael P. Tierney, *of counsel*; Cahill, Gordon, Sonnett, Reindel & Ohl, New York, N. Y., *on the brief*), for plaintiff-appellant.

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KAUFMAN, Circuit Judge:

We are presented in this case with cross-appeals from a final judgment entered April 14, 1970, premised upon a previous default judgment, in favor of plaintiff Trans World Airlines, Inc. (TWA) against defendants-appellants Hughes Tool Company and its chief financial officer, Raymond M. Holliday (Toolco), which, the district court tells us, 312 F. Supp. at 480, is some thirty times greater than the next highest monetary award ever entered.

The extraordinary aspect of this complex litigation is in large measure attributable to the elusiveness of Howard R. Hughes, progenitor and sole owner of Toolco, protagonist in its operations, in a sense the central character of this litigation as well, and yet not a party to this appeal because Hughes himself, although named as a defendant in TWA's complaint, could not be located for service of process.

I.

Since the facts in this litigation have been set forth in detail in many prior reported decisions, *see* 214 F. Supp. 106 (S.D.N.Y. 1963), 32 F.R.D. 604 (S.D.N.Y. 1963); 332 F.2d 602 (2d Cir. 1964); 38 F.R.D. 499 (S.D.N.Y. 1965); 308 F. Supp. 679 (S.D.N.Y. 1969); 312 F. Supp. 478 (S.D.N.Y. 1970), in the interest of avoiding unconscionable length of this opinion, we will limit our own initial statement to a brief resume of the tortuous history of the case, sufficient to permit a meaningful statement of the issues raised.

More than a decade ago, by a complaint dated June 30, 1961, TWA filed its complaint in this action charging

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Toolco and Hughes with violations of the Clayton and Sherman Acts, 15 U.S.C. §§1, 2, 11, and 18, as well as with a claim, for which pendent jurisdiction was asserted, alleging malicious and willful injury to the business of TWA.

Convoluting and protracted pre-trial maneuvers culminated in the failure of Toolco to produce Hughes for a deposition scheduled by court order to be taken on February 11, 1963. As a result of Hughes's confessed unwillingness to appear, as well as the nonproduction by Toolco of certain papers and documents whose disclosure to plaintiff had also been required by court order, the Rule 2 judge assigned to the action (Rule 2, *General Rules for the Southern and Eastern Districts of New York*), Judge Metzner, on May 3, 1963 filed two orders. One entered the default against Toolco and granted TWA's motion to increase the *ad damnum* clause of its complaint from \$105,000,000 to \$135,000,000, after trebling. In the second order Judge Metzner also found Toolco in default with respect to five counterclaims that Toolco had asserted against TWA and several additional defendants. Judge Metzner dismissed these counterclaims and also granted TWA's motion for summary judgment on a sixth counterclaim.

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We granted leave to take an interlocutory appeal from the former order, after Judge Metzner had certified that an appeal was appropriate under 28 U.S.C. §1292(b). But we limited our review to considering whether the district court's jurisdiction over the antitrust action was ousted because primary jurisdiction lay with the Civil Aeronautics Board, which had approved various steps by which Toolco gradually assumed virtually complete control of TWA, holding about 78% of its stock at the time the complaint was filed, and whether certain of the CAB orders associated with those grants of approval constituted a good defense to TWA's action. The interlocutory appeal was consolidated with defendants' parallel appeal as of right from Judge Metzner's dismissal of the counterclaims. A panel of this court ultimately ruled that the district court did properly assert its jurisdiction and that the CAB orders did not constitute blanket approval of the claims in the complaint and hence were not a defense to TWA's action. In the appeal on the counterclaims, the orders of the district court were affirmed with one exception, not relevant here (determining that the CAB had exclusive jurisdiction over one of the dismissed counterclaims). 332 F.2d 602, *cert. granted*, 379 U.S. 92 (1964), *cert. dismissed as improvidently granted*, 380 U.S. 248, 249 (1965).

Judge Metzner's ruling adjudging Toolco in default necessitated an extensive hearing to determine damages. Herbert Brownell, Esq.,¹ appointed Special Master for this purpose, conducted hearings between May 2, 1966 and April 9, 1968. On September 1, 1968, in a thorough

1 Hon. J. Lee Rankin, appointed Special Master during pre-trial proceedings, was replaced when he resigned in December 1965 to become Corporation Counsel for New York City.

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report, the Master awarded TWA trebled damages of \$137,611,435.95. Both sides filed objections. On December 23, 1969, Judge Metzner adopted Brownell's report in all respects, 308 F. Supp. 679, and then in a subsequent opinion awarded attorneys fees of \$7.5 million and assessed costs in the amount of \$336,705.12. 312 F. Supp. 478. On April 14, 1970, the district court entered its final judgment, with 6% interest to run from that date, in the sum—impressive even by space age and inflationary standards—of \$145,448,141.07.²

II

A. Toolco Appeal

The first thrust of the Toolco appeal is directed at the default judgment itself and primarily concerns issues that were not the focus of the damage hearing before Special Master Brownell. The broad question pressed by Toolco is whether TWA is entitled to recover any amount whatever on the record before us, regardless of the adequacy of its proof of damages. Toolco contends (discussed in part III below) that the default judgment was improperly entered against it, in violation of its due process rights, and should be vacated; that (part IV) even if the default judgment is valid, the judgment does not justify assessing damages against Toolco for any antitrust violations, since in Toolco's view the evidence in the record conclusively refutes the possibility that any such violations could have occurred; and that (part V) even if the default judgment establishes antitrust infractions, TWA has not proved that any damages it might have suffered as a result of acts of

² A prayer for equitable relief included in the original complaint was mooted when Toolco sold all its TWA stock in May, 1966.

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mismanagement alleged in the complaint arose from anti-trust violations. On each of these questions, we affirm the judgment below in all respects.

Toolco also contests Special Master Brownell's calculations of the damages. It argues that (part VI), even if proximate causation was shown, the damages were in several respects wrongly computed. In each of these respects we also affirm the reasoning and conclusions of the Master and of Judge Metzner.

Additionally, Toolco challenges under F.R. Civ. P. 54(c) Judge Metzner's grant of TWA's motion to increase the *ad damnum* at the same time he entered the default judgment (part VIII). It also argues that the award of attorney's fees is excessive and unreasonable (part IX). We believe Judge Metzner properly permitted TWA to raise the *ad damnum* and that the payment allowed for legal services was within the bounds of his discretion.

B. TWA Appeal

TWA takes issue with only one item of Brownell's report, viz. certain interest charges credited in mitigation of damages (part X). We affirm the Master's disposition of this issue. TWA also appeals from the denial by Judge Metzner of moratory interest as an element of the damages to be trebled under Section 4 of the Clayton Act, 15 U.S.C. §15. It also questions Judge Metzner's holding that interest on the judgment should run from the date of the district court's judgment, rather than the date the Special Master filed his report, and contests the award of only 6% interest pursuant to New York judgments law, instead of the 7½% currently set by the state Banking Board as the maximum allowable commercial rate. We discuss these issues in part XI and affirm the district court

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on the first two points but hold that proper interest under current New York decisional authority is $7\frac{1}{2}\%$. TWA's last assertion (part XII) is that it may recover \$1.6 million compensation for fees paid to experts as a component of its "cost of suit," 15 U.S.C. §15. With this assertion we disagree.

III.

Toolco argues forcefully that Judge Metzner's entry of a default judgment having such drastic consequences resulted in a denial of due process and was otherwise an abuse of discretion under F. R. Civ. P. 37(b)(2)(iii) and 37(d). We are reminded not only of the severe nature of this particular default but of the fundamental importance of the right to an adversary hearing prior to judicial determination of rights and liabilities. We are in full accord with the general proposition, for which Toolco cites the three leading cases of *Hovey v. Elliott*, 167 U.S. 409 (1897), *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), and *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), that the totality of circumstances surrounding the failure to make discovery must be considered in determining what sanctions to apply under Rule 37. As we understand Toolco's argument, those portions of the "totality of circumstances" it considers to control the invalidity of the default here are these: that TWA did not itself comply with Toolco's efforts to pursue pre-trial discovery sufficiently to lay an adequate foundation for the attempt to depose Howard Hughes; that, to similar legal effect, Judge Metzner on January 10, 1963, improperly denied Toolco's request for a Rule 16 hearing and permitted TWA to delay answering interrogatories served on it by Toolco in the fall of 1962 until after the Hughes deposition sched-

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uled for February 11, 1963; that its own compliance with TWA's requests for discovery was substantial and in good faith; and that TWA did not and indeed could never have shown a need to depose Hughes. In sum it argues that in the face of all this, the district court grossly abused its discretion in not resorting to a less drastic alternative remedy before putting an end to litigation on the merits with a default judgment.

Although we agree with TWA that these arguments are unpersuasive, for the sake of clarity we pause to reject TWA's alternative theory that we may not consider the merits of the default judgment because we are required by either *res judicata* or collateral estoppel to follow the affirmance by the earlier panel of this court of the default judgment entered against Toolco on its counterclaims. *Res judicata* is singularly inappropriate in this context. As we have noted, leave to Toolco to appeal from the default judgment entered on TWA's antitrust complaint was narrowly confined and the panel expressly reserved the very question at issue here, "[t]he propriety of the court's entering a default judgment against the defendants with respect to the complaint" Prior to the judgment now appealed from, there had simply been no "final judgment" entered with respect to the merits of TWA's cause of action against Toolco, and thus we lack the fundamental prerequisite for applying *res judicata*. See *Moore, Federal Practice* ¶0.405[1].

Nor will collateral estoppel avail TWA. The relevant issue "actually litigated and determined in the prior" appeal, *Lawler v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955), was only that Judge Metzner properly entered the default on Toolco's counterclaims. This is a sharply distinguishable issue from the propriety of a dif-

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ferent default judgment in favor of Toolco's adversary (this does not follow, as Toolco suggests, because the latter default is more drastic, but simply because the two questions are not the same). The issue of the propriety of the default here is not a right, question, or fact determined on the previous appeal. We believe we can fairly assume that TWA would not attempt to invoke collateral estoppel if the counterclaim had been asserted in a separate action. Combining two claims for trial as permitted for convenience under the Federal Rules does not dissolve the separate identities of the two claims or the two default judgments. Collateral estoppel and *res judicata* take aim at redundant litigation of identical issues or causes of action; they are not intended to foreclose consideration of the legal merits by analogy—however persuasive the analogies may be.

This is not to say that we will entirely disregard the obvious force of the prior determination on so closely related a question. This is foremost a matter of *stare decisis* and, of course, we are bound by collateral estoppel not to reopen subsidiary issues actually determined in the earlier appeal. We are persuaded that the most important considerations that prompted the earlier affirmance of the default on Toolco's counterclaims compel the same result here.

The essential details of the pre-trial proceedings that climaxed in the default are succinctly set out in Chief Judge Lumbard's earlier opinion, 332 F.2d 602, and we will endeavor to avoid unnecessary repetition. Because the factors bearing on the two default judgments are not identical, however, and in view of Toolco's attack on the district court's conduct of the pretrial proceedings, we cannot entirely avoid a brief sketch of the history of the litigation prior to the default.

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One relatively minor justification put forward by the earlier panel in affirming the default judgment on the counterclaims related to Toolco's noncompliance with two discovery orders entered upon motions made by certain defendants who had been joined in the litigation by Toolco's counterclaim. Toolco now asserts that these production orders concerned matters irrelevant or at least of marginal importance to TWA's complaint. However this may be—and it is virtually impossible, because of the default and the nonproduction of the documents to evaluate this claim—we agree that the failure to comply with orders granted in favor of the other litigants would most likely not in itself have warranted the severe remedy of a default judgment in favor of TWA on the principal action.

But it is also apparent that these production orders are of trivial importance to the propriety of the default judgment in question here, in light of Howard Hughes's deliberate, knowing, willful, and plainly announced refusal to comply with an order requiring his appearance for the taking of his deposition on February 11, 1963, and which had been served long in advance of the return day. The reason that entry of the default was inevitable after Hughes's nonappearance can only be understood against the background of TWA's intensive efforts, first undertaken on the very day that it filed its complaint, to compel Hughes's personal testimony, as a witness and "managing agent" of defendant Hughes Tool Co. under F. R. Civ. P. 37(b)(2). TWA has consistently maintained, and continues to do so, that quite aside from the fact that he was Toolco's alter ego, Hughes's pretrial testimony was absolutely essential for it adequately to frame the issues and prepare for trial because of Hughes's extraordinary secretive methods of doing business. It was the indispensable nature of Hughes's

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personal testimony, according to TWA, that prompted its diligent pursuit of Hughes from the inception of the litigation. TWA's campaign to depose Hughes, which opened with a motion for leave to do so on the date it filed its complaint, was temporarily frustrated when the motion was denied and Toolco was granted priority in the taking of depositions. But TWA renewed its effort with a further unsuccessful motion and proposals to depose Hughes prior to Toolco's depositions. In early January, 1962, TWA adopted a new tactic and repeatedly sought with equal lack of success, to discover Hughes's whereabouts from Toolco. After further futile notices to depose Hughes served in January and February, 1962, TWA achieved a breakthrough when on June 4 the then Special Master rejected Toolco's objections to interrogatories directed to both Hughes and Toolco to locate Hughes so that he might be deposed. Toolco was ordered to answer the interrogatories unless Hughes should authorize counsel to accept service of a subpoena on his behalf for his appearance at the deposition.

On appeal the district court ordered that the interrogatories be answered as modified by it in an immaterial respect. Counsel for Toolco on July 27 informed the Master that Hughes had authorized counsel to accept service of a subpoena for Hughes to appear as a witness. An extended period of wrangling followed. Among other highlights of this period, Toolco refused a proposed stipulation and order to serve Hughes through Toolco's counsel, on the ground that agreeing to the stipulation might prejudice its right to object to the propriety of the deposition. Finally, on September 6, 1962, the same day that TWA charged that a purported authorization for counsel to accept service for Hughes was apparently a forgery, counsel for Toolco informed Judge Metzner that another lawyer,

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Chester Davis, had in fact been served that day in California, pursuant to Hughes's personal authorization. On September 13, as part of its indignant response to the forgery allegation, Toolco submitted to the court the notice of deposition, a subpoena to Hughes, an affidavit of Davis stating his authority to accept service for Hughes, and a second affidavit from a Los Angeles notary stating that Hughes had indeed appeared in person before him and had acknowledged Davis's authority.

Subsequently, the district court adopted a decision of Special Master Rankin that Toolco would bear responsibility for Hughes's response to the subpoena, and stated that Hughes would be considered bound by this declaration unless he objected. No objections were ever made and there is, of course, no question that Toolco was responsible for the actions of the owner of all its stock. At Toolco's instance, the deposition date was twice postponed until by order of January 10, 1963, the court affirmed a final date set by Master Rankin requiring Hughes's appearance on February 11, a schedule "to be adhered to in the absence of extraordinary circumstances." Also on January 10, 1963, Judge Metzner denied an application for a Rule 16 pre-trial hearing that had been presented to it by Toolco on September 25, 1962, at the initial suggestion not of Toolco but of the Master. The motion was denied "without prejudice to renew on papers before the Court 30 days after the completion of the deposition of Howard R. Hughes." Judge Metzner also affirmed the denial by the Special Master of Toolco's motion to depose two financial institutions concerned primarily with issues raised by Toolco's counterclaim, the Irving Trust Co. and Dillon, Reed, & Co., on the ground that to grant the motion would interfere with the scheduled deposition of Howard Hughes.

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Thus by mid-January Toolco had explored and exhausted myriad possible avenues for further delaying the day of reckoning. On February 8, 1963, the Friday prior to Hughes's scheduled appearance the following Monday, Toolco announced a strategy decision. That day Toolco's counsel served on TWA and filed with the court a "notice of position" stating that in view of the court's denial of its motion two days earlier to dismiss the complaint, the denial of a certification permitting review of that order under 28 U.S.C. §1292(b), and because of "the enormous expenses which would be incurred by Toolco . . . in further pre-trial and trial proceedings and the belief of Toolco that such expenses would exceed the amount of damages provable by plaintiff under the complaint" (emphasis added) Toolco "elects, subject only to whatever judicial relief it may hereafter obtain, to rest on the merits of its positions as heretofore taken so that it may avoid the burdens and expenses involved in further pre-trial and trial proceedings prior to the time that an appellate court has the opportunity to rule upon the decisions and orders heretofore made herein" (emphasis added).

At a hearing conducted February 8, 1963, Toolco's counsel, Davis, whose signature appeared on the "notice of position," admitted that "the subpoena on behalf of Mr. Hughes was valid, never was questioned." He also read from the record that portion of a ruling by the Special Master on September 15, 1962, imposing responsibility for Hughes's actions on Toolco, including the Master's comment that "I am piercing the corporate veil as to the Hughes Tool Company, and I am bringing what I hope is clear notice of very substantial sanctions" against Toolco "in case there should be at some later date a . . . failure to respond to the subpoena" Davis commented that

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Toolco was "aware of these rulings" and had accepted the responsibility imposed on it by the Master. Davis further explained that he had described to Toolco the sanctions available in the event Hughes should not appear, with particular regard to F. R. Civ. P. 37(d). Davis further explained that the basis of Toolco's strategic judgment was that which had been expressed in the "notice" a calculation that TWA could not prove damages equal to the expenses of further litigation. Finally, Davis candidly and clearly recognized, and attributed the same awareness to Toolco, "that by insisting on a right to obtain a review on the legal questions which have been decided to date, and should it develop that they are in error . . . as a consequence *they may be deprived of further defending on the merits, other than on the question of damages*" (emphasis added). Davis described Toolco's decision to stand on Hughes's nonappearance as a "business decision"—the wisdom of which Davis himself pointedly would not vouch for—and responded affirmatively to the court's query whether Toolco's position was that "the plaintiff may take whatever proceedings it is advised to take by way of sanctions under Rule 37."

Short of express consent to the entry of a default judgment, a clearer case for the necessity and propriety of such a judgment could hardly be imagined. On appeal, as we have said, the complaint was held sufficient to state an anti-trust claim under several theories and after all that was said at the February 8 hearing Toolco could hardly have been shocked that it then found itself left with nothing to litigate but damages.

The language of the panel on the previous appeal with respect to the Hughes non-appearance is as relevant in this context as it was to the issue presented by the default with respect to the counterclaims:

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"When Hughes chose not to appear for this deposition—which action was taken deliberately and with full knowledge of the sanctions available to the additional defendants under Rule 37—Judge Metzner was fully justified in entering judgments dismissing the counterclaims against TWA and the additional defendants. The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited. However, where one party has acted in willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice, the application of even so stringent a sanction is fully justified and should not be disturbed."

Chief Judge Lumbard further elucidated in words pertinent on this appeal:

"beyond any question . . . the deposition of Hughes was necessary to all aspects of this litigation. Hughes has at all times been sole owner of Toolco and the guiding light behind all the transactions between Toolco and TWA. Both TWA and the additional defendants had the right to depose Hughes.

....

Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and Toolco seized upon every opportunity to forestall this event. . . . Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute. It was only at the very eve of the Hughes

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deposition—after the other litigants had been put to much delay and expense—that the defendants made a ‘business decision’ to terminate discovery.

Hughes’ conduct is particularly intolerable in a large and complex litigation such as this one. The protracted antitrust suit taxes the energies and resourcefulness of each party to the litigation; and it consumes much time of the court and the special masters it appoints. Tactics such as Hughes’ serve only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation.” 330 F.2d at 614-15.

Nor was that panel’s references to the necessity of Hughes’s deposition to “all aspects of this litigation” gratuitous. It was prompted by Toolco’s position on the earlier appeal that Hughes’s deposition was relevant *only* to the TWA action and not to the counterclaims. Even if we are not bound in a strict legal sense by the previous ruling that Hughes’s deposition was essential to TWA’s claim, that holding was manifestly correct. As will be seen, many of TWA’s asserted charges relied on interpretations of intent and of the significance of ambiguous projects quickly aborted, and of possible exploratory actions taken by Toolco that may or may not have been relevant to TWA’s several antitrust theories. The reality behind the charges could hardly be tested without the testimony of the one man who personally directed Toolco’s activities throughout the relevant period and whose singular penchant for secrecy was, after two years of frustrating delay in the conduct of the litigation, well known to the Master and the trial court. Clearly the court was entirely correct in concluding that the litigation would

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only continue its desultory course without the appearance on stage at the earliest possible moment of the hitherto unseen Prince of the drama. Thus, the court's decisions to postpone all further discovery by Toolco—discovery of the sort which had not substantially advanced the litigation in the past—were not only within its discretion but quite obviously correct. Indeed, in light of TWA's express reliance on Hughes himself to establish as much as 75% of its own case against Toolco, one would have expected that Toolco might have welcomed the opportunity to force TWA to play the card that it had proclaimed was so important to its case, in the expectation that a disappointing deposition would open the way for an early termination of the case favorable to Toolco. Toolco's argument that TWA had not by February 8 laid a sufficient foundation for its case thus falls as well, because by failing to produce Hughes, Toolco deprived both TWA and itself of the opportunity to establish their respective positions. Finally, the suggestion that the court might have resorted to some sanction short of a default judgment after Toolco had announced a policy decision to take an action that would give it the right to take an immediate appeal—which only a final judgment on the merits would accomplish—and following the willful refusal to produce a witness whom the court had rightly found central to the expeditious progress of the lawsuit, has such an air of unreality about it as to bear its own refutation. Contrast *Rosenberg, Sanctions to Effectuate Pretrial Discovery*, *Colum. L. Rev.* 480, 495 (1958) (giving party "second chance" desirable in appropriate case).

Toolco intimates that throughout the litigation TWA sought in bad faith to win a fabricated case by exploiting Hughes's known craving for solitude. Nothing in the record would justify any such finding, and in any event the

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district court did offer to permit the deposition to be taken in as much privacy and under any other conditions that might suit Hughes's aversion to public appearance.

The cases relied on by Toolco are far afield and demonstrate by negative implication the inevitability of the default in this case. For example, in *Gill v. Stollow*, 240 F.2d 669 (2d Cir. 1957), the court reversed the entry of a default only upon a showing of a "real attempt to comply" with an order requiring the witness to travel from England to New York for the deposition, a trip the court found actually barred by his ill-health. There, the witness defied doctors' orders to appear for the deposition within two months of the time scheduled for taking it. As far as we know, defendants have never in the eight years since the default judgment represented that Hughes was willing to be deposed were the default vacated. *Von Der Heydt v. Rogers*, 251 F.2d 17 (D.C. Cir. 1958) (per curiam) reversed a default judgment only upon a conclusion that the district court had not adequately set forth its findings. Concurring separately, then Circuit Judge Burger commented that "if the information sought is material to the case and not privileged, and if appellant was able to produce it, failure to produce warrants dismissal." *Id.* at 19. That is precisely the case here, except that the information sought was more than merely "material." It was essential. It could prove to be the life or death of the action. In *Independent Productions Corp. v. Loew's, Inc.*, 283 F.2d 730 (2d Cir. 1960), we simply found full compliance with the only court order outstanding at the time of the default judgment and concluded that the default judgment was improperly entered merely because when the witness appeared for the deposition he raised a Fifth Amendment privilege. See also *Bon Air Hotel, Inc. v. Time, Inc.*, 376 F.2d 118 (5th Cir. 1967), *cert. denied*, 393 U.S. 815 (1968).

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(petitioner's failure to comply due to inability brought about neither by its own conduct nor by circumstances within its control did not warrant default judgment). Finally, *Societe Internationale v. Rogers*, 357 U.S. 197 (1957), as in *Gill*, reversed a default judgment only on the strength of findings by the Special Master, adopted by the district court, and approved by the court of appeals, that the party had made good faith and diligent efforts to execute a production order where compliance would have violated Swiss law.

Indeed, the circumstances mandating entry of a default judgment here are stronger than in *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), where the party against whom a default judgment was entered claimed a privilege that it urged justified its noncompliance. Despite this, the Court ruled that because the Hammond Co. "absolutely declined to obey the order," which required production of evidence that the court could only "assume was material," in view of the non-compliance, the default judgment was proper. As in this case, Hammond too relied on the denial of pretrial motions by the defaulting party that would have postponed compliance with or modified the order. The Court found no abuse of the district court's broad discretion to control pretrial procedures.

In light of the foregoing, it would appear that were less at stake in this litigation, the propriety of the default judgment would not have deserved the full discussion we have afforded it. The entry of the default judgment was inescapable and virtually invited by Toolco.

IV.

Toolco, assuming *arguendo* that we would hold that the default judgment was properly entered against it on TWA's

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complaint, seeks nevertheless to avoid any liability for the antitrust violations alleged by TWA on the ground that we are required to find as a matter of law that facts essential to establish any such violations, although alleged in the complaint, are in fact untrue and could not have been proved by TWA at a trial. To the extent that the allegations of antitrust infringements are not conclusively disproved, so Toolco asserts, the allegations themselves are either too vague or conclusory or otherwise insufficient to support any recovery whatever. We disagree.

Despite inevitable sharp contrasts of tone and emphasis in the voluminous briefs, the parties do not seem to disagree that Judge Metzner, in preliminary rulings prior to the damage hearing and again in his decision adopting the report of the Master, applied an entirely correct standard in defining the legal effect of a default judgment. We too find Judge Metzner's discussions of the law in this complicated area unexceptionable. Extracting justiciable standards from the venerable but still definitive case, *Thomson v. Wooster*, 114 U.S. 104 (1885), Judge Metzner ruled that by its default Toolco admitted every "well pleaded allegation" of the complaint, a term of art which Judge Metzner interpreted to permit finding an allegation not to be "well pleaded" only "in very narrow, exceptional circumstances:"

"For example, an allegation made indefinite or erroneous by other allegations in the same complaint is not a well-pleaded allegation. Other examples . . . are allegations which are contrary to facts of which the court will take judicial notice or which are not susceptible of proof by legitimate evidence, or which are contrary to uncontroverted material in the file of the case." 308 F. Supp. at 683.

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Judge Metzner then discussed the meaning that the much-mooted phrase "judicial notice" should take in the present context, as distinguished from the much different circumstance of a full trial, and summarized his previous discussion as implying that "only indisputable facts"—facts which could not possibly be rebutted if the non-defaulting party were permitted a trial—may be judicially "noticed" to rebut factual material otherwise admitted by a default. Toolco now attempts to hoist Judge Metzner by his own petard in directing our attention away from the "judicial notice" standard to certain "material in the file of the case" introduced by Toolco during the hearing on damages which according to Toolco has not been "controverted" by TWA. But this argument stands the matter on its head and implies that it was TWA's responsibility to defend the allegations of its complaint by rebutting adverse matter introduced by Toolco in the damage hearing. TWA had no obligation to introduce any evidence whatever in support of the allegations of its complaint. Matter introduced by Toolco to disprove or mitigate damages which only *tends* to contradict the allegations of the complaint has no legal effect except as it bears on the question of damages unless it could not conceivably have been refuted and disproved by TWA had there been a trial and thus is "indisputable." It would usher in a new era in the dynamics of litigation if a party could suffer a default judgment to be entered against it and then go about its business as if the judgment did not exist and as though, despite the opportunities to comply with the court's orders and to defend on the merits which had been ignored, the slate was wiped clean and a new day had dawned. To state the proposition is to expose the folly of it.

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The applicable principles are clearly implied from *Thomson v. Wooster, supra*, where the court held that defendants who had defaulted in a patent infringement suit would not be permitted to show that the patent sued upon was invalid. Defendants had sought to introduce the original patent to show it differed from a reissued patent, which was the patent the plaintiffs sought to enforce. The court ruled that neither this proof nor evidence that defendants had delayed 14 years in seeking reissue were sufficient to defeat the contrary allegation of the validity of the patent contained in the complaint because, *inter alia*, the delay "might possibly have been explained, and the court could not say as a matter of law, it was insusceptible of explanation. . . ." We are instructed by *Wooster* that so long as the facts as painted by the complaint "might . . . have been the case" they may not now be successfully controverted by Toolco. There was a time for that and Toolco cannot elect to default and then defend on the merits. It cannot have its cake and eat it too.

Toolco's adversion to TWA's alleged failure to buttress its allegations in effect seeks to have us review the evidence presently in the record as though we were passing on a motion by Toolco for summary judgment supported by appropriate affidavits following normal discovery proceedings and prior to entry of any final judgment. In such a case, we would grant the motion unless TWA "set forth specific facts showing that there is a genuine issue for trial." F.R. Civ. P. 56(e). But TWA need not introduce any facts whatever in support of its complaint. Judgment has already been entered in its favor on a complaint held on the earlier appeal to this court to state a sufficient claim. Only damages remained to be determined. As Judge Metzner ruled "[w]here file material is involved, if the plaintiff did not have full opportunity to

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meet or controvert such material, then it should not be used to nullify the allegation." This conclusion is the clear implication of the Court's refusal to permit the admission of the prior patent in *Thomson*.

We have, nevertheless, reviewed all the evidence introduced and relied on by Toolco in its attempt to negative its liability and conclude that Toolco has shown nothing that renders inconceivable the likelihood that TWA could have proved at trial that actions by Toolco which formed the basis for the award of damages were in fact, as alleged in the complaint, violations of the antitrust laws. Although we have found it desirable to set forth and affirm the propositions of law relied upon by the district court and by both Masters involved, it would serve no useful purpose to rehash in detail the arguments which defendants have repeatedly urged to show that the exacting test of *Thomson v. Wooster* has been met and which incidentally have been rejected both by Judge Metzner and Special Master Brownell in thorough and well-reasoned opinions.³

Briefly, as we said on the earlier appeal, the allegations of the complaint "state the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce, all unlawful under the antitrust statutes." 332 F.2d 602, 611. Specifically, in the first of three claims set forth in the complaint—the only claim upon which TWA introduced evidence of damages—TWA contended that Toolco, 100% owned by Hughes throughout the relevant period, acquired control of TWA and made it a "captive market" for Toolco "with the primary purpose of restraining and monopolizing the trade

³ We also are in agreement with the similar statements of the applicable principles of law contained in Brownell's report, as well as those in a preliminary opinion of Special Master Rankin dated July 30, 1965, and in an earlier opinion of Judge Metzner, reported at 38 F.R.D. 499 (S.D.N.Y. 1965).

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and commerce" of TWA, which was alleged to constitute a substantial proportion of various defined markets for airplanes, including jets, and related equipment. TWA further alleged that defendants intended that Toolco would become the sole source of supply of jet-powered aircraft to TWA (thus by implication intending to monopolize a substantial portion of a defined market) and a dominant source of supply of jets to air carriers generally; that suppliers to TWA other than Toolco would be boycotted; and that defendants would cause Toolco to supply TWA with aircraft only upon condition that TWA would accept financing dictated by Toolco.

Quite apart from proof of intent, paragraph 9 of the complaint alleged that defendants conspired to restrain trade in violation of Section 1 of the Sherman Act; provided financing to TWA only on the condition that plaintiff buy all aircraft needed for its operations from Toolco; required TWA to boycott all suppliers of aircraft except Toolco; conspired to monopolize the TWA market in violation of Section 2 of the Sherman Act; attempted to monopolize the TWA market, also in violation of Section 2 of the Sherman Act; and sold and leased jets to TWA on the condition that TWA not buy or lease the goods of a competitor of Toolco, in violation of Section 3 of the Clayton Act.

Paragraphs 11 through 29 of the complaint set forth in detail specific acts performed in furtherance of the offenses charged and for the improper purposes alleged, as outlined above. Thus, according to the complaint, Toolco first acquired TWA with the intent to make it its own market for supplying aircraft, an intention which was carried through into the advent of the commercial jet age during the years 1955-56. In 1956, according to these

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allegations, Toolco ordered a total of 33 Boeing jets and 30 additional Model 880 jets manufactured by General Dynamics Corporation ("Convair"). At the same time, defendants prohibited TWA from "making any arrangements for the acquisition, by sale, lease, or otherwise, of any jet-powered aircraft." The complaint goes on to say that throughout 1956-60, Toolco refused to assign to TWA the rights to acquire the jets on order from Convair and Boeing, despite TWA's requests that it do so and despite provisions in Toolco's contracts with Boeing and Convair that permitted it to do so. Jets leased to TWA by Toolco on a day-to-day basis in 1959-60 were the only jets made available to TWA during the years 1955 to 1960 and were inadequate to TWA's needs, it was charged. Each lease was conditioned on TWA's agreement and understanding that it would not purchase or lease aircraft from any other supplier. In 1960 six of the Convair 880's Toolco had ordered in 1956 were leased to Northeast Airlines, including three previously assigned to TWA. Similarly, in June, 1959, six of the Boeing jets ordered in 1956 were "diverted to the principal transatlantic competitor of TWA" (Pan Am). While thus restricting TWA's purchases of jets, the complaint alleged that Toolco also inhibited TWA's ability to obtain equity financing and caused TWA to rely chiefly on debt financing, thus rendering TWA unable to finance needed aircraft acquisitions except upon Toolco's approval. Toolco intended by this restriction to increase TWA's dependence on Toolco in furtherance of its unlawful purposes. From 1955-60 defendants prohibited TWA from obtaining financing for the acquisition of jets required for TWA's needs.

The damages which Brownell ultimately awarded to TWA consisted primarily of profits lost as a result of

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(1) diversion of the six Convair's to Northeast; (2) temporary retention by Toolco of four additional of the ordered Convair's and the ultimate lease of those jets to Northeast; (3) diversion of the six Boeings to Pan Am; (4) the lease, instead of outright sale, of jets in 1959-60; and (5) late delivery of 47 of the 63 jets ordered in 1956, which would have been avoided if, by the allegations of the complaint, Toolco had not unlawfully constricted TWA's financing and acquisition of its own jet fleet. Although TWA also attempted to prove other damages resulting from Toolco's manipulation of its financing, and further damage arising from delayed sales of obsolete prop aircraft, Brownell found TWA's proof in these respects insufficient and TWA does not appeal from either determination. No damages were sought to be proved for alleged continuing antitrust violations by Toolco subsequent to December 15, 1960, when Toolco put all its TWA stock in a voting trust controlled by three voting trustees (including Holliday), thus relinquishing control of TWA, an action required as a condition of loans to TWA advanced by various banks and insurance companies to permit the purchase of new jets.

As it did before Brownell and Judge Metzner, Toolco now seeks to discredit primarily one part of paragraph three of TWA's complaint, in which TWA alleged that Toolco had been engaged since 1939 "in the development, manufacture and acquisition of aircraft and related equipment" and its "sale and lease" to air carriers, and to demonstrate the inadequacy of one antitrust theory that, according to Toolco, collapses if the allegations of paragraph three are untenable. Toolco thus would have us find *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), to be the linchpin of TWA's complaint, without which the remainder cannot hold together. In *Yellow Cab*, the

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Court reversed the grant of a motion to dismiss a complaint which had alleged that a company engaged in the business of manufacturing taxis had established control of a substantial segment of cab operations in four cities and had exploited its control by extracting exclusive purchasing agreements from its owned cabs and taxi companies, thus excluding other manufacturers from the affected market with the ultimate effect, as the Court said, that "the appellees effectively limited the outlets through which cabs may be sold in interstate commerce." *Id.* at 226. This argument fails at each of three points. Toolco has not established to our satisfaction that TWA could not possibly have proven violations analogous to those alleged in *Yellow Cab*. Even if it had, additional specific allegations of antitrust violations in the complaint other than the one which rests on the holding in *Yellow Cab* are not conclusively disproved by Toolco's evidence. Nor has Toolco demonstrated that TWA's postulates for recovery are in any other manner not "well pleaded."

To disprove the allegation of paragraph 3 that Toolco was a "manufacturer" of commercial airplanes, Toolco relies primarily on (1) CAB opinions and orders dating from 1944-50 that concluded Toolco was not then engaged in or planning the manufacture of airplanes for commercial use, (2) schedules to CAB Form 41 Reports filed by domestic trunk airlines pursuant to 49 U.S.C. §1377 indicating that between 1950 and 1966 none of these airlines purchased or leased a Toolco-made airplane, and (3) the fact that no TWA annual report ever mentioned the manufacture of a "Hughes plane." These documents, Toolco asserts, conclusively establish that Toolco was never a manufacturer of commercial aircraft and certainly not a competitor with the giant manufacturers—Boeing, Douglas, and Convair—and

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thus the exclusive dealing arrangements alleged in the complaint are entirely innocuous and incapable of producing the kind of market foreclosure alleged in *Yellow Cab*. Toolco similarly sets out to undermine the allegation that it was a "dealer" in aircraft, again directing attention to CAB opinions and orders dated no later than 1950 finding no sales or leases of planes by Toolco to any airline but TWA; and again introducing the Form 41 Reports to the same effect but extending to 1961. The thrust of its argument is that under no view of the complaint, given the facts established by these documents, could TWA conceivably have proved more than that Toolco as a parent of TWA engaged in good-faith efforts to rescue it from financial crisis and to operate it as a successful business enterprise. Even if TWA could prove mismanagement by Toolco, that is insufficient, in Toolco's view, to intimate any possible foreclosure of competition—since Toolco was a mere manager or conduit and had no independent competitive significance—and accordingly TWA's theories must be found barren, since danger to free competition is the *raison d'être* of the antitrust laws and some showing of such a danger in every case is a *sine qua non* of proving their infringement.

Both Judge Metzner and Master Brownell met Toolco's argument in this respect head-on, holding that courts could not consider as conclusively proven, facts merely recited in CAB orders and opinions and in airline reports that are the product of no adversary proceedings, distinguishing between the *existence* of such documents, of which courts might in an appropriate case take judicial notice, and the truthfulness of their contents, which would be subject to contrary proof had the trial precluded by Toolco's default actually been conducted. We agree with the reasoning of

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both opinions and find the authorities there relied on to be in point and sound. See *Stasiukevich v. Nicolls*, 168 F.2d 474, 479 (1st Cir. 1958); *McCormick on Evidence* §328 at 704, §330 at 709 (1954); *Morgan, The Law of Evidence*, 1941-45, 59 *Harv. L. Rev.* 481, 482-87 (1946); *McNaughton, Judicial Notice*, 14 *Vand. L. Rev.* 779 (1961).

Moreover the documents described above, while (if their contents were accepted as true) showing that Toolco was not a major force as a supplier of aircraft other than to TWA, hardly negative the possibility that Toolco possessed independent economic significance, apart from its role as supplier to TWA, sufficient to support proof of any or all the antitrust theories limned by TWA's complaint. There is evidence in the record of activities by Toolco or Hughes that suggest significant movement by Toolco and Hughes toward actual or potential commercial manufacturer or dealership in airplanes, especially jets, and their parts. We cannot say that proof at a trial—prevented by Toolco's conduct—that Toolco was more than a conduit for TWA but rather possessed independent competitive significance with respect to the commercial aircraft market, would be insufficient, if combined with appropriate related proof of the intent, attempt, collusion, tying arrangements, boycotts, and monopolization alleged in the complaint, to support an antitrust judgment for TWA.

The evidence that Toolco's interests and ambitions in commercial air flights may have extended beyond mere management of TWA begins with Toolco's admitted role, initiated in World War II and continuing to the present day, as a substantial manufacturer of helicopters and aircraft parts for military purposes (and now of aerospace materials as well). Although Toolco stresses the non-commercial nature of this activity, it is clear that Toolco

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throughout the relevant period had the technical capability and sophisticated "know-how," to enter the commercial market without untoward delay if it had so chosen. Early in its history, Toolco acquired the rights to the first forty Constellation aircraft developed in cooperation with Lockheed in the early 1940's. Twenty-five of these were intended by Toolco for sale to airlines other than TWA. 6 CAB 153, 155 (1944). During and after the war, Hughes actively engaged in the development (ultimately unsuccessful) of a plan worthy of Jules Verne, for a 700-passenger plywood flying boat for commercial development. Manufacture by Toolco of aircraft in association with AVRO of Canada, and of Caravelles as a licensee of Sud Aviation of France, were considered during the middle 1950's. In 1956, Toolco ordered at least 300 Pratt & Whitney jet engines, later sold primarily to Boeing and Pan Am at a substantial profit. The engines could well have been intended for installation in the planned Toolco jets and in any event constituted Toolco as a competitor with other sellers of jet engines.

Also in 1956, secret discussions were commenced within the inner circles of Toolco and TWA for Toolco to manufacture commercial jets, a plan scuttled before the end of that year by the initiation of a CAB investigation into the matter which followed a TWA motion to the Board for approval to purchase up to 25 Toolco-manufactured commercial jets. Through most of 1955, Toolco was engaged with Convair in the development of a jet which again proved unfeasible. Evidence of these last mentioned aborted forays is consistent with allegations in paragraphs 14 and 15 of the complaint that defendants arranged with Convair to develop "a jet-powered aircraft to be manufactured by Convair and to be supplied by the defendants to

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air carriers" and that "defendants also entered into a plan under which Toolco would itself" manufacture jets to be furnished "both to TWA and to other air carriers."

Additionally, there was testimony that Toolco ordered seven Convair 880s manufactured to the specifications of Capital Airlines and thirteen Convair 990s built for American Airlines' requirements.

Finally, Toolco's activities with respect to the 63-plane fleet ordered in 1956, only part of which was ever delivered to TWA, further support an inference that Toolco contemplated that it was or might become more than a manager for TWA. Thus, Toolco conditioned its order for the Convair 880's on a stipulation that the price to it would be reduced progressively as Convair was successful in selling more of the planes beyond the initial orders by Toolco and by Delta Airlines, Inc., a condition consistent with possible Toolco participation in marketing the 880. Non-assignment provisions in the purchase agreements do not conclusively negate the capacity of Toolco to have dealt in its Boeing and Convair contracts and priority rights with airlines other than TWA—and of course Toolco did not in fact exercise its right to assign the contracts to TWA. Ultimately, of course, as alleged in the complaint and demonstrated at the damages hearing, defendants did sell or lease 16 planes of the ordered 63-plane fleet to Pan Am and Northeast. As Master Brownell observed, the ability of Toolco to deliver these jets immediately may have given Toolco a significant competitive advantage over their own manufacturers. Late in 1959, Hughes negotiated with Lockheed for purchase of Electras at a time when Toolco's own actions indicated TWA was fully stocked with jets.

Toolco's response to most of these considerations is that each is consistent with a sole intent on its part to deal in

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aircraft and aircraft parts solely for the benefit of TWA. However, the allegation in the complaint that Toolco refused to assign the rights to the ordered fleet to TWA, although it was empowered to do so under the contracts of sale, is consistent with a contrary inference.

In any event, the question is not whether one inference or another is the stronger but whether Toolco's evidence—in light of its default and thus the absence of a trial—absolutely forecloses the possibility that Toolco enjoyed actual or potential independent competitive significance in the commercial aircraft market sufficient to support a finding of an antitrust violation under any of the several hypotheses put forward in the complaint, including, in addition to the *Yellow Cab* theory, (1) unlawful intent to monopolize a substantial portion of the commercial aircraft market in restraint of trade; (2) unlawful conspiracy to do so, see *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); (3) enforcement of an illegal boycott, see *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457 (1941); *United States v. New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949); *Klor's Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959); (4) tying adequate financing of TWA to its purchase or lease of jets from Toolco, and vice-versa, see *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502-03 (1969); and (5) the lease of Aircraft to TWA on the condition that TWA not purchase or lease aircraft from other suppliers, see *Inter-*

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National Salt Co. v. United States, 332 U.S. 392 (1947);
Standard Oil Co. of California v. United States, 337 U.S.
293 (1949).

Toolco's reply brief argues that the allegations of unlawful intent are unduly vague but this is unsupported by the cases it relies on, *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F.2d 885, 888 (4th Cir. 1934); *SCM Corp. v. Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969) (mere conclusory and vague allegations and nothing more, of unlawful attempt or conspiracy to monopolize or to restrain trade, or, simply, to violate the antitrust laws, were held insufficient). By contrast, TWA's complaint alleges specific acts by defendants allegedly pursuant to an intent to monopolize specified markets by means which are described in detail in the complaint. These allegations are both adequate as a matter of proper pleading and sufficiently definite to support an award of damages entered on the default judgment.

Toolco's argument that a conspiracy among Holliday and Hughes, as officers and shareholders of Toolco, with Toolco itself, is as a matter of antitrust law unprovable, is an illustration of the thrust of Toolco's approach to the question whether the decisive allegations in the complaint are "well-pleaded." Whether TWA might have proven such a conspiracy would have turned on the nature and weight of technical and secretive evidence bearing on the independent economic significance of each of the parties and also on subjective questions of intent and attempt. Toolco's conduct barred even initial exploration of these crucial factual issues. We are reminded that even summary judgment "should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged con-

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spirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System, Inc.*, *supra* at 473. See also *White Motor Co. v. United States*, 372 U.S. 253, 259-60 (1963). We should be far more reluctant to grant summary judgment for Toolco following entry of judgment for TWA, as it now in effect requests us to do, when its own default barred even initial exploration of the crucial factual issues.

V.

The opinions below and the briefs submitted to us on this appeal reveal some confusion as to the proper scope of the hearing on damages. As the authorities cited above illustrate, a default judgment entered on well-pleaded allegations in a complaint establishes a defendant's liability. Also, at the hearing before Special Master Brownell it was incumbent upon TWA to introduce evidence showing the extent of the damages which resulted from the antitrust violations established by the default judgment. The difficulty arises as to a question that Toolco refers to in part II of its main brief as one of "proximate cause." To what extent did the default judgment dispense with a plaintiff's normal obligation to show that damages alleged were proximately caused by Toolco's illegal actions? The answer seems to us inherent in the question.

The default had the effect of admitting or establishing that the acts pleaded in the complaint violated the antitrust laws and that those acts caused injury to TWA in the respects there alleged. Because, however, the damages were unliquidated and uncertain, F.R.Civ.P. 55(b), it was necessary for TWA at the hearing to establish the extent of the injuries established by the default. The outer bounds of the recovery allowable are of course measured by the principle of proximate cause. The default judgment did

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not give TWA a blank check to recover from Toolco any losses it had ever suffered from whatever source. It could only recover those damages arising from the acts and injuries pleaded and in this sense it was TWA's burden to show "proximate cause." On the other hand, there was no burden on TWA to show that any of Toolco's acts pleaded in the complaint violated the antitrust laws nor to show that those acts caused the well-pleaded injuries, except as we have indicated that it had to for the purpose of establishing the extent of the injury caused TWA, in dollars and cents.

Thus, in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962), cited by Toolco, the court held that an antitrust plaintiff could not recover for losses attributable to a watered-down product rather than to defendant's acts. To the same effect are the other cases relied on by Toolco, e.g., *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952) (plaintiff could not recover for losses based on defendant's illegal restriction on its distribution of first-run movies during a period when plaintiff's theatre was not equipped to show first-run movies). TWA purports to dispute Toolco's abstract statement of the appropriate scope of the damage hearing, relying on an unreported district court opinion whose reasoning on the issue of proximate causation we adopted in *Jones v. Uris Sales Corp.*, 373 F.2d 644 (2d Cir. 1967). While TWA cites *Jones* for the proposition that at the damage hearing it had no obligation to show proximate cause in any sense, the central language of the district court opinion in *Jones* which TWA relies upon belies its own assertion: "[t]he causal relationship is stated distinctly in the complaint by the allegation that

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Penn diverted profits belonging to the defendant Uris. All that remained to be supplied were the identities of the accounts and the enterprise to which they were diverted, and the amount of the profits diverted" (Emphasis added.) Implicit in the limiting words we have emphasized is the proposition that it was plaintiff's obligation following the default to establish that any lost profits for which it sought recovery were in fact those whose unlawful diversion was established by the default judgment. The default judgment proved the fact of the diversion (the injury) and its illegality. But to recover damages, plaintiff was necessarily required to establish that those damages were attributable to the diversion. Thus, however well-pleaded the allegation that profits were diverted, plaintiffs in *Jones* could not avoid, to the extent necessary to establish the causal nexus for the recovery of damages, introducing evidence relating to the diversion alleged.

Nor do we believe, contrary to Toolco's assertion, that Special Master Brownell misunderstood this issue. His formulation that the "burden of establishing proximate cause is satisfied as to liability if proximate cause is adequately alleged in the complaint" (emphasis added) is consistent with our own understanding of the law and, as we will elucidate shortly, we find his application of the proper principles to have been unexceptionable. In fact, Toolco helpfully reminds us that Special Master Brownell disallowed two major elements of damage alleged by TWA. We have reference to those supposedly arising from the assertions in TWA's complaint that it was chronically underfinanced by Toolco and from TWA's claimed tardy sale of its prop fleet. His conclusions on this score were based on his determination that TWA's proof that those damages arose from the illegal acts and injuries established by the default judgment was inadequate.

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Despite its present broad assertion (perhaps in an excess of caution), that "proximate cause" was in no sense an element essential to establishing recoverable losses, TWA's strategy at the hearing, with respect to the damages actually awarded, was in fact designed to prove causation. To illustrate, and to lay the foundation for our discussion of Toolco's various claims that in several respects TWA's proof of causation was inadequate, we conclude this portion of our opinion by sketching the contours of the evidentiary foundation of TWA's damage award.

TWA's most important witness was Robert W. Rummel, at the time of the hearing TWA Vice President for Planning and Research. Rummel testified to the effect that had Hughes and Toolco not interfered with TWA's operations in the manner alleged in TWA's complaint, TWA would have attempted to acquire in the commercial market a jet fleet of its own consisting of the same 63 airplanes we have made reference to—33 Boeing 707's and 30 Convair 880's—which Toolco did in fact order for TWA and which were ultimately delivered to Toolco in 1959-60. As we have noted, major elements in the damages awarded were losses incurred by TWA and caused by Toolco's diversion of 16 of these jets, 6 Boeings and 10 Convairs, to Pan Am and Northeast and delays in the delivery of the Boeings and Convairs that were not diverted. Brownell accepted only in part Rummel's testimony that the delays in the Convair deliveries were solely attributable to Hughes's misconduct, but he fully accepted Rummel's testimony as to the makeup of the "reconstructed" 63-jet fleet. His report concluded that only the Convair delays beyond those provided in a March 2, 1960, amendment to the original delivery schedule were chargeable to defendants, since delays reflected in that amendment were caused by Convair's own mismanagement.

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John B. Connelly, Vice President and Assistant General Manager of Boeing Aircraft Division corroborated TWA's claim that delays in Boeing deliveries were caused by defendants' failure to negotiate with reasonable diligence for priorities in delivery dates in 1955 when jets were first offered commercially. The thrust of the Connelly-Rummel testimony was that if defendants had not, as alleged in the complaint, prevented TWA from negotiating for itself, it would have ordered and received a full 63-jet fleet sooner than it in fact received the abbreviated 47-jet fleet from Toolco. Apart from a portion of the Convair delays, Brownell credited this evidence in its entirety. The illegality of Toolco's arrogation of all authority for buying aircraft was, as we have said, conclusively established by the default judgment.

Two other fact witnesses for TWA testified as to losses caused by disruptions in the transition from prop to jet operations attributable to defendants' interference with the Convair 880 deliveries. The Special Master adopted their computations without reservation and, except for Toolco's attack on the underlying finding of disruption already referred to, Toolco does not seem to press its argument that the proof with respect to these items was inadequate.

The testimony of TWA's four expert witnesses fared somewhat worse with the Special Master than did that of its so-called "fact witnesses." Brownell rejected a "Comparative Profit Study" report comparing TWA's actual profits with two of its competitors during two separate periods offered in an effort to prove TWA's losses. The report was prepared by Coverdale & Colpits, a consulting engineering firm, and testimony concerning it was given by a partner in the firm, Edward L. Wemple. The Special Master did, however, accept the computations contained in

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a second Coverdale report tracing in detail the operating losses attributable to Toolco's disruption of the jet fleet for the years 1959-63. These computations included an estimate of increased profits that would have accrued had TWA owned outright certain Boeing 707's which Toolco only leased to it in 1959-60, as well as of profits that would have been realized otherwise from timely delivery of the reconstructed fleet.

TWA also attempted to prove damages resulting from Toolco's inadequate financing of TWA by introducing a study prepared by Drexel Harriman Ripley, Inc. (the DHR study) testimony concerning which was given by its Senior Vice-President, Edward J. Morehouse. Morehouse testified that if TWA had been independently and competently managed during 1955-60, it could have financed the purchase of the reconstructed fleet at much lower costs than those actually incurred through Toolco's management. The program of independent financing described by the DHR study was rejected by Brownell, as was a report prepared by R. Dixon Speas Associates estimating TWA losses from belated sales of piston airplanes.

Finally, John C. Biegler, a partner of Price Waterhouse & Co., testified with respect to a report in evidence and prepared by his firm under his supervision which reconstructed TWA's historical financial posture on the basis of TWA's evidence of disruptions and their supposed effects which were caused by Toolco. The Price Waterhouse study, as supplemented at times during the hearing, was the vehicle through which evidence of both sides bearing on the effect on TWA operations of supposed Toolco disruptions was translated into differences between actual and hypothetical TWA profits.

Toolco's direct case consisted of testimony of four expert witnesses, Gene M. Woodfin, partner in Loeb, Rhoades

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& Co., investment brokers, and Nathan S. Simat, Robert I. Helliesen and L. John Eichner, principals in the aviation consulting firm of Simat, Helliesen & Eichner, Inc. Each of defendants' experts sought to discredit the evidence of Wemple, Morehouse, and Speas.

Thus, as is apparent from the above summary, TWA did not rely only on its default judgment but introduced evidence linking each component of the damages claimed to the pleaded illegal acts of Toolco and injuries to TWA. Toolco contends, however, that TWA's proof should have been rejected by the Special Master and that TWA has not established that the delays in delivery, the diversions, or the Boeing leases caused any damage to TWA attributable to those acts and injuries.

VI

Both sides agree that Special Master Brownell's findings, adopted by Judge Metzner, may not be disturbed at this juncture unless we agree with Toolco that they are "clearly erroneous," F.R.Civ.P. 52(a), the standard also properly applied by Judge Metzner himself in reviewing the Master's Report, F.R.Civ.P. 53(e)(2). Our function would seem to be in a sense redundant, since it appears that each of the substantial objections to the Master's conclusions raised by Toolco before us has already been considered and rejected by the district court. But because of the huge sums involved in this litigation, we have not been content to rest on Judge Metzner's appraisal of the Master's findings and have made our own independent review of those findings. We agree with Judge Metzner's assertion that it is relevant that Special Master Brownell's report is a product of "painstaking" analysis of highly complex questions following hearings on damages which extended over a period of

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two years, consisting of hundreds of hours of testimony and producing a transcript of 11,000 pages. See *Badenhausen v. Guaranty Trust Co.*, 145 F.2d 40, 53 (4th Cir. 1944), cert. denied, 323 U.S. 797 (1945); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 274-75 (1949). We might add that his report reflects an extraordinary awareness of the issues raised and the applicable principles of law.

In this connection we observe that the Master, in considering the proof of both parties, did so with explicit reference to the classic statement of the applicable guidelines expressed in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946), permitting an award in cases such as this to be based "upon probable and inferential, as well as direct and positive proof," and imposing on the wrongdoer any "risk of uncertainty which his own wrong has created," *id.* at 264. Indeed, the Supreme Court recently observed:

"Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts."

Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100, 123 (1969). In this case the reference to risk in *Bigelow* would seem to have even greater application. Toolco must bear the responsibility for any lack of preciseness of proof, and there is good reason that this should be so. The fault itself by Toolco rendered precise proof of damages more difficult than in the usual antitrust case, where

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the plaintiff may avail itself of the full battery of discovery procedures to prove damages as well as to prove liability. Toolco cannot be permitted to block the discovery of precise, clear and direct evidence and then be heard to complain that the evidence should have been more convincing.

In any event, our answer to each of the many objections that Toolco raises to the specific findings of the Special Master as to the "proximate cause" of the damages awarded TWA, is that each of the challenged findings is amply supported by evidence introduced during the hearing and that none is "clearly erroneous." Toolco's arguments on this score are principally five, each of which we shall discuss sufficiently to demonstrate the basis for the Master's conclusions.

1. Toolco attacks first the validity of the entire basis of the damage award, the reconstructed 63-jet fleet which Brownell found constituted "a proper basis for computing damages." That he was justified in doing so is established first by Rummel's testimony that TWA *should* in fact have ordered the fleet that Toolco ordered for it, although with more dispatch. Rummel was TWA's senior engineer in 1943, chief engineer in 1949, elevated to Vice President in charge of Engineering in 1956, was throughout this period closely associated with Hughes himself in his early exploration of the commercial jet market and indeed may have been the only individual with whom Hughes entrusted a share of responsibility for aircraft procurement. Rummel testified that he reported directly to Hughes, had authority to commit funds under Toolco's contracts, and "the Toolco factory representatives at Boeing and Convair reported to me as special representative of Toolco responsible for the technical administration of the Toolco contracts" His primary responsibility throughout most

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of his employment with TWA "has been to recommend what size and what type fleets to procure" In addition to the historical fact that Rummel, chief procurement officer for TWA at the time and Hughes' confidant, participated in and concurred in the decision to acquire the 63-jet fleet, the assumption that TWA would have acted approximately as did Toolco in the interest of exploiting to maximum financial benefit the enormous potential of the jet age is entirely reasonable. Indeed, in view of the well-pleaded allegations of the complaint, asserting that defendants did not always act in the best interest of TWA, and defendants' contrary assertion that it did always so act, it ill-behooves defendants now to suggest that a well-managed TWA would have acted differently in evaluating its jet fleet requirement than did Toolco.

Assuming then that an independent TWA would have attempted to acquire the same 63-jet fleet ordered by Toolco, defendants contend that TWA would not have been able to finance such an undertaking, which would have cost about \$353 million or \$93 million more than TWA actually spent for its 47-jet fleet. Toolco notes that \$100 million of the financing for the 47-jet fleet was supplied by Toolco itself through its purchase of TWA subordinated debentures. We find untenable Toolco's characterization as insufficient to support the Special Master's contrary assumption that an independent TWA would and could have financed the full 63-jet fleet, the evidence that United, American, and Pan American Airlines each were in fact able to finance comparable ventures during the same period. Toolco directs our attention to financial reversals experienced by TWA during the period preceding the time Brownell assumed TWA would have financed the fleet (1958-59). But the well-pleaded allega-

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tions of the complaint demonstrate conclusively that crippling TWA's financial posture and reducing it to a state of vassalage, dependent on Toolco's support, was part of defendants' overall antitrust violation. See Complaint ¶¶17, 18, 19, 22, 23, 24, 26, 50, 51, and 52(a). To the extent of negating Toolco's attempted reliance on TWA's asserted financial weakness, these allegations must be given effect. Any inferences other than that an independent TWA would have fared neither better nor worse than competing airlines in financing its jet fleet would have been unwarranted.

3. Assuming then that the 63-jet reconstructed fleet was a reasonable basis for assessing damages, Toolco nonetheless insists that Special Master Brownell erred in his findings that in several respects (concerning the delays in Boeing and Convair deliveries; the leasing of Boeings to TWA; and the diversion of 16 jets to TWA's competitors) an independent TWA would have been managed to better financial advantage. It first attacks the assumption, fully supported by testimony of Rummel and Boeing Vice-President Connelly, that more diligent bargaining for Boeing jets would have resulted in TWA enjoying approximately the same rights to priority in deliveries as did Pan Am, American and United. Rummel's testimony adequately supports the conclusion that TWA would and could have engaged in negotiations reasonably "calculated to preserve TWA's competitive position in the industry for early deliveries," to quote Brownell's words. Connelly, who was in a position to be entirely familiar with Boeing's policies with respect to delivery dates,⁴ testified, contrary to

⁴ Connelly testified that as Director of Contract Administration he was a member of a "headquarters group" at Boeing in 1955 and in 1966 became Vice President and General Manager in charge of the department at Boeing in which responsibility for commercial airline programs was centralized.

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Toolco's present contentions, that more diligent efforts by TWA would in fact have resulted in substantial parity of priorities.

Because of Master Brownell's and Judge Metzner's thorough discussions of these questions, and in the interest of curtailing this necessarily protracted opinion, we will not continue to discuss each of the other fine-drawn points raised by Toolco in an attempt to discredit this testimony. It is sufficient that we note we have thoroughly considered each of them and found them insufficient to support a holding of clear error.

4. Special Master Brownell concluded that defendants' dalliance in securing Convair deliveries and its active interference with Convair's production schedule was responsible for delays beyond the amended delivery schedule. This finding is amply supported by evidence of (1) Hughes's refusal to accept delivery of the Convair 880's when Convair was ready to deliver them; (2) his assumption of personal control of all matters concerning the deliveries and his direction that TWA was not to proceed with any acceptance procedures without personal clearance from Hughes; and (3) Hughes's personal instructions to Toolco armed guards at one point to forcefully seize four CV-880's from the Convair production lines, thereby aggravating Convair's production difficulties. Moreover, it was uncontested that TWA received its planes on an average approximately 9.9 months later than provided in the original schedule, while deliveries to Delta were delayed by only 1.4 months.

5. Finally, the Master's assumption that TWA as a non-handcuffed independent operator would have pur-

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chased outright nineteen Boeings leased to it by Toolco in 1959-60 is supported by evidence in the DHR study establishing that as a general rule outright ownership was more desirable than leasing under the conditions existing at that time, subject to certain exceptions not applicable. Also, in cross-examination, defendant's expert Woodfin, admitted that the 1959-60 leases were an interim and unsatisfactory arrangement. The Master's observation that, of 2,036 aircraft operated by certified route carriers on December 31, 1960, only 117 were leased, is also relevant.

VII.

Our response to Toolco's objections to certain calculations by Special Master Brownell of damages, given that the elements of injury to TWA—from late deliveries, non-deliveries, leases instead of sales, and resultant disruption—were properly established, as we believe, is based on the same rationale that underlies our conclusions in the preceding portion of this opinion. Once again, we find none of Brownell's findings to be clearly erroneous.

There are essentially two issues raised with respect to the calculation of damages, which seem to be subdivided for purposes of analysis and emphasis many times in the briefs. The first concerns the degree of injury due to Toolco's failure to deliver the 10 diverted Convairs and 6 diverted Boeings in light of the size of TWA's jet fleet over the period of five years, 1959-63, for which damages were assessed. Toolco claims alternatively that certain aircraft purchased by TWA during that period made up for at least part of the lost profits that would otherwise

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have been incurred as a result of the lost 16 planes. Moreover, to the extent the losses were not thus compensated for, Toolco would attribute the fault not to the diversions but to the failure of TWA's new management to "mitigate" damages by purchasing other jets to replace the diverted ones (as we have noted, three voting trustees, two of whom were not controlled by defendants, assumed control of Toolco's voting stock on December 15, 1960). We do not believe that these claims are inconsistent, as TWA asserts. Rather they amount in the aggregate to a single contention that TWA did in fact partly mitigate damages but could and should have done so entirely, or at least to a greater extent.

The second issue raised is based on the argument that even if TWA's fleet size was decreased as a result of Toolco disruptions to the extent found by Brownell, one cannot calculate the extent to which the larger fleet would have increased TWA's profits.

A. Fleet Size.

All the issues raised with respect to the decrease in the size of TWA's fleet attributable to Toolco's mismanagement turn on the conflict between the testimony of Toolco's experts and that of TWA's expert, Wemple, of Coverdale & Colpits, who prepared and gave testimony concerning two reports estimating damages, assuming TWA had received the full reconstructed 63-jet fleet on schedule, rather than 47 jets late. As we have said, Brownell rejected one report, the Comparative Profits Study, but accepted entirely the calculations of the other, which we will refer to as the Wemple study. To rebut the Wemple study, Toolco introduced a report by Simat of Simat, Hellicson & Eichner, Inc., which Brownell rejected in its entirety.

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According to the evidence accepted by Brownell, the six Boeings were diverted to Pan Am between November 5, 1959 and June 8, 1960 (they would otherwise have been received by TWA between July 19, 1959 and May 9, 1960). The ten Convairs were to be received between December 1959 and September 1960. On March 5, 1959, Toolco told TWA that it would not receive the Convairs. Six were then diverted to Northeast (and in 1963 repurchased by TWA). The other four were retained for a time by Toolco, then sold to Northeast (and never bought by TWA).

Brownell accepted Wemple's estimates that the Convair diversions resulted in the loss to TWA of the use of 5.1 planes in 1960, 9.9 planes in 1961, the 10 planes in 1962, and 7.9 planes in 1963. The six Boeings, unlike the Convairs, were suitable for international as well as domestic use. Brownell accepted Wemple's conclusion that their diversion resulted in a loss to TWA of use of the following quantities of planes in the stated years, for international and domestic use:

	<i>International</i>	<i>Domestic</i>	<i>Total</i>
1959	0.2	none	0.2
1960	3.6	1.4	5.0
1961	3.7	2.2	5.9
1962	4.8	1.0	5.8
1963	0.9	0.5	1.4

The markedly lower figures in each category for 1963 reflect the purchase by TWA in that year of the six diverted Convairs and the lease for use in 1962 and 1963 of five Boeing B-331B's (as substitutes for the diverted B-331's).

Brownell also accepted Wemple's testimony that even if it had received its full 63-jet fleet on schedule, TWA would still have leased, as it in fact did, four B-720B aircraft (a

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medium range late model Boeing) during 1961-62 and would also have purchased 18 additional B-131B fan jets in 1962. Thus, these purchases were not considered as mitigating the damage caused by Toolco's diversions.

Toolco argues that there is no justification for Brownell's refusal to consider the purchase and lease of these B-720B's and B-131B's as at least partially mitigating damages. Alternatively, it contends that there is no support for the conclusion that any deficiency in TWA's fleet existing in 1959-60 as a result of Toolco's diversions, could have had effects that lingered for four years, into 1963, three years after Toolco relinquished control of TWA. Rather, Toolco insists, at least by 1962 and 1963 any deficiencies in the TWA jet fleet must be attributed either to TWA's business judgment that investment in replacements was not economically justified (thus there could have been no damage resulting from the earlier diversions) or to TWA's unjustified refusal to mitigate damages. The cumulative thrust of this pincer argument is that if TWA would have profited, as Brownell found, from the lost jets, why did not TWA replace them? If it would not have profited, there can be no damages.

We find Wemple's testimony that the B-131B purchases and the B-720B leases did not represent "substitutes" for the lost jets justified by several considerations. First, these assumptions were based on Wemple's background of expertise, and there is no basis in the record for finding they were dictated by TWA's counsel, as Toolco maintains. Second, no airline which commenced using commercial jets in the period during which damages were assessed stood pat and remained contented with its originally acquired fleet during that time. Thus, between 1960 and 1963, Pan Am increased its jet fleet from 38 to 64; United

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from 34 to 91; and American from 25 to 73 jets. It is entirely reasonable and appropriate to assume TWA would also have expanded its fleet. Thus, it was not for the Master to conclude that the damages caused by the diversions had been entirely mitigated as soon as TWA acquired a fleet of 63 jets, as it did during 1962. It was not until 1963, the last year for which damages were assessed, that TWA obtained a fleet comparable to the 63 jets it should have had in 1959-60, plus those that it acquired in the meantime. Moreover, the transcontinental but not international-range B-131s may not have been an effective substitute for either the lost intercontinental-range B-331's or the diverted intermediate range Convairs. Finally, we note that Toolco failed to present a single expert witness to challenge the claim that the interim acquisitions did not mitigate damages, or to present an alternative assumption; indeed, Simat, Toolco's own expert, relied on Wemple's contention in this respect.

In support of its claim that TWA failed to mitigate damages, Toolco specifically cites (1) TWA's termination of the B-720B leases in 1962; (2) the decision of a Flight Equipment Committee appointed by TWA in 1961 to lease *only* four B-720B's, instead of six, as recommended by Rummel; (3) a reduction in its order of the B-131B's from an original 20 to only 18 actually purchased in 1962; and (4) its refusal in 1961 to buy the four CV-880's retained by Toolco which were ultimately sold to Northeast.

It is sufficient response to the latter contention to note that the complaint alleges that Toolco offered the CV-880's only on the illegal condition that TWA would not buy jets from Boeing, and Toolco has not shown that this contention was not well-pleaded. This adequately explains TWA's refusal to purchase the CV-880's offered by Toolco. More-

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over, there is evidence that neither the B-720B's nor the B-131B's were adequate substitutes for the diverted jets, and thus TWA's actions with respect to those planes are not necessarily indicative of its ability and thus of a deliberate refusal to compensate for the diverted aircraft. In any event, the burden of proof to establish failure to mitigate damages was on Toolco, see *Ellerman Lines Ltd. v. The President Harding*, 288 F.2d 288, 291 (2d Cir. 1961); *United States v. Warsaw Elevator Co.*, 213 F.2d 517, 518-19 (2d Cir. 1954); *United States v. Russel Electric*, 250 F. Supp. 2, 20 (S.D.N.Y. 1965), and Toolco failed to demonstrate TWA's financial capability to purchase substitute jets deliverable before 1963, or that any such jets were on the market. There is evidence in the record indicating that the lead time in the purchase of jet-powered aircraft, each of which is tailor-made in many respects for the specific customer, is several years. Finally, a holding, in the face of no evidence to the contrary offered by Toolco, that TWA was financially able in the time immediately after the transfer of control to restock its depleted fleet, would not be consonant with the allegation of ¶53(a) that Hughes's manipulations of TWA had left it financially debilitated.

B. Lost Profits From Decreased Fleet Size

Toolco also attacks Wemple's testimony credited by the Special Master, that even if TWA had received all 63 jets, the additional 16 jets would have enjoyed a "load factor" (measure of the number of passengers carried on an average trip) equal to the average load factor for all jets of the same types during the years for which damages were assessed. Toolco's principal argument is that its own expert was correct in (1) considering the probable depressing

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effect on demand of introducing new jets into the commercial air flight market and (2) basing his estimates on TWA's specific records of profits for each of its separate jet routes.

But adding 16 planes to the market would have increased overall capacity of domestic American air carriers by only 3.7% at most. It is entirely reasonable to believe that TWA's new, modern jets would have attracted at least as many extra passengers to TWA as might have been lost because of the added capacity. Thus one does not have to strain to recognize that TWA's competitors would have borne a loss of passengers. In any event, the effect hypothesized by Toolco is highly speculative and Toolco has not carried its burden of proof on this score.

Moreover, Toolco's approach of calculating the potential market for the lost planes only by looking at the capacity of each existing TWA route to absorb the new capacity is too rigid and the Master was not clearly in error to reject it. There is no reason to believe TWA could not have arranged its schedules to maximize its profits.

Finally, there is simply no sound reason to accept Simat's assumption that international competitors of TWA would have increased their transatlantic jet flights by four for each flight added by TWA. The Master was justified in rejecting this guesswork.

*C. Accounting Adjustments in the
Price Waterhouse Study*

Toolco seeks to challenge certain adjustments made in the Price Waterhouse financial analysis, upon which both parties relied throughout the hearing to show the financial impact on TWA of various competing or alternative assumptions, some of which were ultimately resolved in

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favor of TWA, and some in favor of Toolco. Contrary to the claim in Toolco's reply brief, these adjustments were made by Price Waterhouse, not Beigler, who directed the study and testified concerning it. In Plaintiff's Exhibit 50, Biegler merely summarized the adjustments already made by Price Waterhouse and which were previously incorporated in its study. The exhibit included an index of references to the Price Waterhouse study that explained and justified each conclusion. Toolco raised no objections to any of these adjustments before the Special Master, although it had ample time to study the Price Waterhouse report prior to Brownell's decision and in the face of Judge Metzner's clearly expressed and entirely appropriate suggestion that any technical problems that might arise after Toolco had thoroughly scrutinized the report should first be referred to Brownell so that rebuttal evidence could be put in the record. Toolco's failure to do so is inexcusable, particularly in litigation as complex and difficult as this is. It is precluded from raising these issues now since its conduct has denied TWA an opportunity to submit its own evidence on these intricate accounting matters to the Special Master.

In any event, Brownell's acceptance of the adjustments relied on by both parties and to which no objections were made can hardly be assigned as plain error unless the defect is patent and obvious on the face of the report. We find none of the adjustments complained of clearly erroneous, and indeed most, if not all, seem clearly justified as reflecting reasonable accounting procedures.

VIII.

In its May 3, 1963 order entering the default judgment on TWA's complaint, as we have already noted, the district

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court also granted TWA's motion to increase the trebled ad damnum from \$105,000,000 to \$135,000,000. Toolco assigns this as error under F.R.Civ.P. 54(c), which provides that "a judgment by default shall not . . . exceed in amount that prayed for in the demand for judgment." Although the authorities do not appear to be in agreement and this Circuit has not expressed itself on the question, we are of the view that there is no sound basis for restricting TWA to the precise damages originally sought in a case where damages alleged were unliquidated, and where defendant did not default by non-appearance, but rather because of non-compliance with discovery procedures, and indeed was granted a full trial on the question of damages actually caused by the allegations established by its default. See *Riggs, Ferris & Geer v. Lillibridge*, 316 F.2d 60, 62-63 (2d Cir. 1963); *Sarlie v. E. L. Bruce Co.*, 265 F. Supp. 371 (S.D.N.Y. 1967); 6 Moore, Federal Practice ¶¶54.61, 55.08 at 1206. Toolco cannot in good conscience complain of any unfairness or surprise, for, as we said in discussing the propriety of the default judgment, at no time has it sought to rectify its refusal to cooperate with the legitimate discovery orders, an act it easily could have performed after Judge Metzner granted the motion to increase the ad damnum. Moreover, at the February 8 hearing, prior to Hughes's non-appearance, TWA clearly announced its intention to apply for an increase in the prayer for damages to the trebled \$135 million.

IX.

Judge Metzner awarded attorneys fees to TWA of \$7.5 million based on the time expenditure of 56,000 hours and taking into consideration many relevant factors which are each thoroughly discussed in his opinion, 312 F. Supp. 478.

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Toolco assigns the award as error largely on the basis that the hourly rate (about \$128) is excessive, thus ignoring the unprecedented size of the judgment (the allowance for attorneys fees is less than 6% of the award of damages), the complexity of the proceedings, and the fact that the default judgment was the product of intensive pre-trial activity for two years and was followed by exhaustive appeals and intricate damages proceedings during which Toolco persistently attempted to undo the effects of its own default. In extraordinary litigation such as this, it would be artificial to fix an arbitrary hourly rate without regard to other relevant factors, for example, quality of the representation, the success achieved, and the size of the award. There are no exact formulations of which we are aware, that would require a precise maximum hourly fee to be fixed in a vacuum. Under all the circumstances, especially in view of Judge Metzner's meticulous discussion of the problem, we are unable to say that he exercised his broad discretion in this respect unreasonably. *W. Montague & Co. v. Lory*, 193 U.S. 39, 48 (1904); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 245 F. Supp. 258, 302 (M.D. Pa. 1965), *vacated on other grounds*, 377 F.2d 776 (3d Cir. 1967), *reversed in part on other grounds*, 392 U.S. 481 (1968).

TWA'S CROSS-APPEAL

The five points raised by TWA on its appeal do not call for more than summary discussion.

X.

Its only objection to Brownell's computation of damages is that he sensibly permitted a deduction from TWA's

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damages for the cost of capital that TWA would have incurred if it had independently purchased its 63-jet reconstructed fleet because of interest charges that TWA would have incurred if the necessary capital had been borrowed in 1958-59. The Special Master calculated a somewhat higher interest rate (6.3%) for the Convairs than for the Boeings (6%) because the Convairs under the reconstructed plan would have been delivered later than the Boeings. In arriving at a rate of 6.3%, the Master relied on average interest rates charged to other airlines for similar loans during this period, and indeed paid by TWA itself on its own comparable indebtedness during that period. The 6-6.3% rate is identical to that which TWA's expert Morehouse had computed in a portion of his rejected financing plan which contemplated some additional borrowing, in 1959, supplementing earlier financing in 1955 at lower rates.

In seeking a smaller deduction for interest costs, TWA relies on (1) its Exhibit No. 314, showing interest rates on debts outstanding to various airlines in 1960, but without regard to the times that the debts were incurred or the purposes for which they were incurred; (2) the rejected Comparative Profits Study; and (3) a Price-Waterhouse estimated financing charge premised on the rejected Morehouse report. For the reasons just indicated, each ground asserted is insufficient to establish that Special Master Brownell's adoption of the higher rate was clearly erroneous. In the absence of a viable alternative offered by TWA (and TWA does not contest the rejection of the Morehouse and Comparative Profits studies) the Master properly based his deduction for interest charges on the price of money at the time when financing would normally have been arranged for the 63-jet fleet.

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XI.

TWA also argues that the interest allowances on the damage award and the judgment itself were incorrect.

TWA contends that it was improperly denied moratory interest as an element of "the damages sustained" by it under Clayton Act §4, 15 U.S.C. §15, to be computed from the time the damages were sustained and trebled to the date of judgment. We agree with the Seventh Circuit's contrary resolution of this issue in *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 877 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971). It is reasonable to interpret Congress's silence on the matter as indicating that trebled damages are sufficient penalty and that interest need not be included. See *Rodgers v. United States*, 332 U.S. 371 (1947). Moreover, trebled damages will more than adequately compensate TWA for its injuries. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945). Thus, there is no inherent policy reason to award moratory interest here and not doing so avoids difficult questions of proof—including highly abstruse inquiries as to proper rates and the time from which interest should run. Since the trebled damage device in any event adequately serves the penal and remedial purposes of the antitrust laws, we believe that it is sounder, absent contrary express Congressional intent, to consider that these difficult and time-consuming inquiries are intended to be avoided.

TWA also urges that interest on the judgment should run from the time the Master filed his report, rather than from the date of the district court's judgment, contrary to the apparently clear language of 28 U.S.C. §1961, which speaks of an award of interest "from the date of the entry of the judgment" and applies by its terms to "any money judgment . . . recovered in a district court." TWA is not,

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as it attempts to show, "penalized" in any sense by any delay in judgment occasioned by the court's discretionary referral of the case to a Master. To the contrary, the salutary device of having the highly complex questions in this case heard and analyzed by a Master served to expedite this litigation. TWA cites no authority in point for its position⁵ and we perceive no good reason to adopt its novel argument in the face of the plain words of Section 1961.

We do, however, agree with TWA that under New York law, applicable here pursuant to 28 U.S.C. §1961 (interest on the judgment is calculated "at the rate allowed [on such judgments] by State law"), interest on the judgment should be at the rate of 7½% rather than the 6% allowed by Judge Metzner. Under N.Y.C.P.L.R. §5004, interest on money judgments in New York "shall be at the legal rate." When this section was first adopted in 1963, it clearly referred to the rate then set as the maximum allowable interest rate prescribed by Gen. Bus. Law §340 (6%). Section 340 was subsequently superseded by an identical provision codified as §5-501(1) of the N.Y. Gen. Obl. Law. In 1968, that provision was amended to give the State Banking Board discretion to set the maximum rate of interest allowable on loans or their equivalent. The 6% rate was thereafter to prevail only if the Board prescribed

5 *Tilgham v. Proctor*, 125 U.S. 136 (1888), and other patent cases relied on by TWA do not involve the question of when interest begins to run on a judgment, but rather from when interest as an element of damages should be measured. The holding of the cases cited is that interest should run from the date that the fact and amount of damage cease to be "in earnest controversy and of uncertain issue," *id.* at 161, an event marked by the filing of the Master's report. Since we determine that moratory interest is inappropriate here, these cases are inapplicable. In *L. P. Larson, Jr., Co. v. Wm. Wrobley, Jr., Co.*, 20 F.2d 830 (7th Cir. 1927), a trademark and unfair competition case, the question at issue was also the time from which interest would be assessed "as an element of damages." *Id.* at 836. See also *Carter Products, Inc. v. Colgate-Palmolive Co.*, 214 F. Supp. 383, 417-18 (D. Md. 1963).

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no other maximum lending rate. In February, 1969 (the Court's judgment was filed in 1970), the Board prescribed a rate of $7\frac{1}{2}\%$.

Ever since the amendment to Section 5-501(1), there has been a lively controversy among New York courts and commentators as to which rate governs money judgments — 6% or the rate set by the Board. The commentator to the C.P.L.R. argued persuasively in 1969 (see N.Y.C.P.L.R. 1970 Supp. at 146-49) that the sounder view was that the Board's rate should prevail, since the purpose of C.P.L.R. §5004 was to set interest on money judgments at the going rate at the time in New York State, and the purpose of amending Section 5-501(1) was to permit that rate to be responsive to changing economic conditions. The commentator saw no need for leaving the rate of interest on judgments rigid after the state had determined that for commercial purposes the rate should be more flexible.

We agree with this reasoning. Toolco relies on our contrary decision in *Caldecott v. L. I. Lighting Co.*, 417 F.2d 994 (2d Cir. 1969), where we followed the tentative view of the then highest state court ruling on this question, *Belcher v. Kesten*, N.Y.L.J. July 29, 1969, p. 11, col. 7 (Sup. Ct. Queens County). Since *Caldecott* was decided by us, the Appellate Division, First Department, has unanimously held in *Rachlin & Co. v. Tra-Max, Inc.*, 308 N.Y.S. 2d 153 (March 5, 1970), that the $7\frac{1}{2}\%$ rate should apply to a money judgment on a claim founded in contract. We see no sound basis for distinguishing contract from tort actions in fixing the appropriate rate of interest on a judgment and since *Rachlin* is presently the most authoritative declaration of New York law interpreting C.P.L.R. §5004, we will modify the judgment of the district court and direct that interest run from the date of the judgment at the rate of $7\frac{1}{2}\%$.

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XII.

TWA's last contention is that it should be compensated for fees paid to its experts as part of its "cost of suit," 15 U.S.C. §15. This precise issue has long since been decided contrary to TWA's position in this Circuit, *Straus v. Victor Talking Machine Co.*, 297 F. Supp. 791 (1924) and TWA has not persuaded us that that decision, or the unanimous host of cases relying on *Straus* in this and other jurisdictions should be overruled. See e.g., *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 224 (9th Cir. 1964); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), cert. dismissed sub nom. *Wade v. Union Carbide & Carbon Corp.*, 371 U.S. 801 (1962); *Farmington Dowel Prods. Co. v. Forester Mfg. Co.*, 297 F. Supp. 924 (D. Me.), aff'd and remanded, 421 F.2d 61 (1st Cir. 1969).

The judgment is modified to allow 7½% interest on the judgment. In all other respects, the judgment of the district court is affirmed.

**Orders of the Court of Appeals in Dockets No. 34902
and No. 35114, September 28, 1971**

[CAPTION]

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants Hughes Tool Company and Raymond M. Holliday, and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Chief Judge Friendly and Judge Mansfield took no part in the consideration of this petition.

HENRY J. FRIENDLY

Henry J. Friendly

Chief Judge

September 28, 1971.

[CAPTION]

A petition for a rehearing having been filed herein by counsel for the appellants Hughes Tool Company and Raymond M. Holliday,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Dated: September 28th, 1971

J. JOSEPH SMITH

J. Joseph Smith

IRVING R. KAUFMAN

Irving R. Kaufman

PAUL R. HAYS

Paul R. Hays